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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~670~~ 24

IN THE MATTER OF THE FLORIDA EAST COAST RAILWAY CO.,
Debtor,

ST. JOE PAPER CO., a corporation, and JESSIE BALL duPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, RAILWAY LABOR EXECUTIVES ASSOCIATION, SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY SYSTEM and F. K. CONN,
Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD CO.,
Respondent.

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD W. BOURNE
ANDREW OLIVER
WILLIAM A. BOYLAN
120 Broadway
New York 5, N. Y.

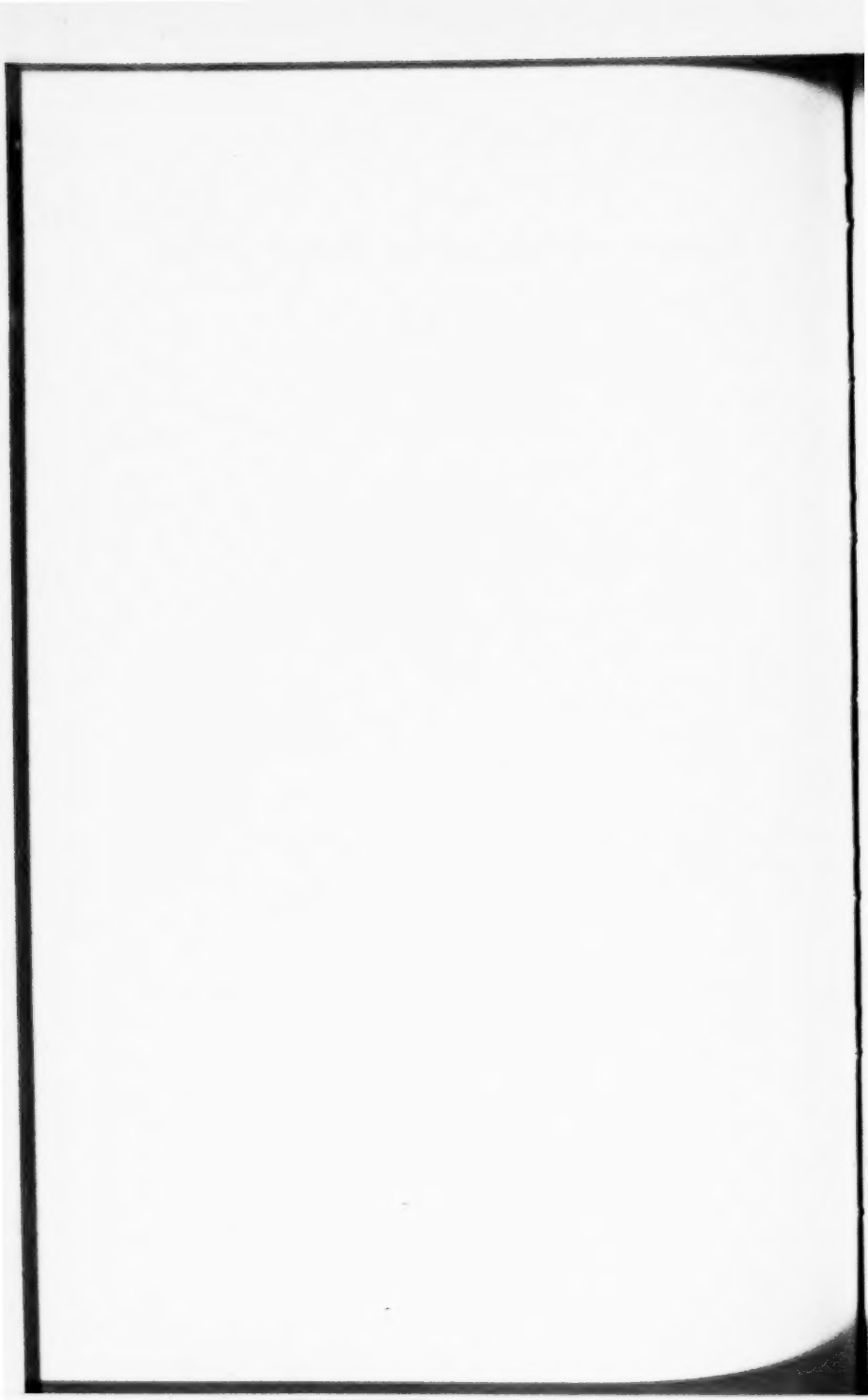
CHARLES COOK HOWELL
RICHARD B. GWATHMEY
Wilmington, North Carolina

CHARLES COOK HOWELL, JR.
Atlantic National Bank Bldg.
Jacksonville, Florida

Attorneys for Atlantic Coast Line Railroad Company, Respondent.

April 6, 1953

Bowne & Co., Inc., 163 Front Street, New York 38



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 670

IN THE MATTER OF THE FLORIDA EAST COAST RAILWAY CO.,

Debtor,

ST. JOE PAPER CO., a corporation, and JESSIE BALL DUPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, RAILWAY LABOR EXECUTIVES ASSOCIATION, SEABOARD AIR LINE RAILWAY COMPANY, SOUTHERN RAILWAY SYSTEM and F. K. CONN,

Petitioners,

VS.

ATLANTIC COAST LINE RAILROAD CO.,

Respondent.

BRIEF OF THE RESPONDENT, ATLANTIC COAST LINE RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioners seek a review by this Court of an order of the Court of Appeals, Fifth Circuit, sitting *en banc*, entered on January 19, 1953, by which that Court (Chief Judge HUTCHESON, Judges HOLMES and RIVES, with Judges RUSSELL and BORAH dissenting) reversed an order dated March 11, 1952 of the District Court for the Southern District of Florida (Circuit Judge STRUM sitting as a District Judge) and directed the District Court to approve a plan

of reorganization of the Debtor, providing for a transfer of the Debtor's property to Atlantic Coast Line Railroad Company, which the Interstate Commerce Commission had certified to the District Court pursuant to Section 77 of the Bankruptcy Act.

Atlantic Coast Line Railroad Company, the appellant in the Court of Appeals, is the sole respondent in this Court.

The petitioners include the principal appellees in the Court of Appeals but not all of them. Under an order of the Court of Appeals the filing of the petition has stayed the mandate of the Court of Appeals. It is presumed that this Court will dispose of the petition without awaiting the filing of any other possible petitions or any briefs in opposition thereto. This Court has admonished parties in railroad reorganization proceedings "to exercise the highest degree of diligence" in these cases (*Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.* (1935) 294 U. S. 648, 685); there is no reason why any of the other appellees below could not have filed petitions for certiorari by this time if they intend to file any at all; and the imminence of the summer recess makes it especially important that the disposition of the pending petition be not deferred because of anything done or omitted by any of the other appellees below.

OPINIONS BELOW.

The opinion of the Court of Appeals (II, 717-733[1]) is reported: *In re Florida East Coast Ry. Co.* 201 F. 2d 325. The opinion in the District Court (I, 127-168) is reported: *In re Florida East Coast Ry. Co.*, 103 F. Supp. 825.

The opinions relate to a plan of reorganization, referred to herein as "the Commission's Plan" or simply as "the Plan", which the Commission approved initially in

[1] In this and similar citations the Roman numerals refer to the volume of the printed record and the Arabic numbers to the page.

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its Fifth Supplemental Report of July 12, 1951, *Florida East Coast Railway Company Reorganization*, 282 I. C. C. 81-191, and which the Commission modified slightly, and approved as modified, in its Sixth Supplemental Report of October 25, 1951, and its order of the same date, *Florida East Coast Railway Company Reorganization*, 282 I. C. C. 195-226. Photo-lithographed copies of the Fifth and Sixth Supplemental Reports and the order of October 25, 1951 will be found consecutively at the front of Volume I of the Record. The definitive Plan will be found in the order (282 I. C. C. 213-226).

* * * * *

An earlier plan, sometimes referred to herein as the Previous Plan, providing for a unification of the Debtor with the Atlantic Coast Line, which was approved in the Commission's Third and Fourth Supplemental Reports, *Florida East Coast Railway Company Reorganization*, 267 I. C. C. 295-391, 267 I. C. C. 729-759,[1] was the subject of an opinion in the District Court (Circuit Judge SIBLEY), *In re Florida East Coast Ry. Co.*, 81 F. Supp. 926, and an appeal, referred to herein as the "prior appeal", *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 179 F. 2d 538. Atlantic Coast Line Railroad Company, respondent now, petitioned for certiorari, which was denied, *Atlantic Coast Line Railroad Co.* v. *St. Joe Paper Co.*, 339 U. S. 929.[2]

---

[1] Photo-lithographed copies of these two Reports will be found in Volume IV of the Record, immediately following a photo-lithographed copy of the Second Supplemental Report.

[2] The Commision first approved a plan on April 6, 1942, *Florida East Coast Railway Company Reorganization*, 252 I. C. C. 423 (VI, 528-640). After consideration of petitions for modifications the plan was modified in certain respects and approved as modified in the Commission's Supplemental Report of August 10, 1942, *Florida East Coast Railway Company Reorganization*, 252 I. C. C. 731 (VI, 641-689). On October 19, 1943 District Judge STRUM sustained objections to the plan and remanded it to the Commission, *In re Florida East Coast Ry. Co.*, 52 F. Supp. 420 (VI, 690-697). After hearings the Commission approved a plan for an "internal reorgani-

The Record.

The printed record consists of six Volumes. Nos. I-III comprise the printed record on appeal in the Court of Appeals, with the proceedings in the Court of Appeals at the back of Volume II. Nos. IV-VI comprise the printed record in the Court of Appeals on the prior appeal.

The Index to Volume III, which is at the front of each of Volumes I, II and III, does not list correctly the sequence in which the Exhibits of the various parties appear.[1]

The unprinted record consists of everything which was before the Court of Appeals in unprinted form. It contains everything in the Atlantic Coast Line's Designation of Contents of Record (I, 173-229) which is not in any of Volumes I-VI.

JURISDICTION.

The writ is sought under 28 U. S. C. § 1254.

THE QUESTIONS PRESENTED.

I. The petitioners' first question can be restated thus:

Can the Interstate Commerce Commission and Court approve, and the Court confirm, a plan of reorganization of a debtor in a Section 77 reorganization, which provides for a transfer of the debtor's property to another railroad

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zation" on January 8, 1945 in its Second Supplemental Report, *Florida East Coast Railway Company Reorganization*, 261 I. C. C. 151-193. (A photo-lithographed copy of the Second Supplemental Report will be found at the front of Volume IV of the record.) After the filing of various petitions for modifications, some of which contained requests for further hearing, the Commission reopened the case (267 I. C. C. 295-296).

[1] The Index should read as follows:

Deposit Committee Exhibits Nos. 1 to 8.
Lynch Interests Exhibits Nos. 1-A to 22-A, 25-A, 26-A, 27-A and 28.
Atlantic Coast Line Railroad Company Exhibits Nos. 1 to 10.
St. Joe Paper Company Exhibits Nos. A to Z and AA to DD.

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corporation, over the objection of the holder or holders of a majority in amount of a large class of bonds which are a lien on most of the debtor's property?

The St. Joe Paper Company and the Trustees of the duPont Trust, who control the Paper Company, together own 56% of the Debtor's principal bond issue, the First and Refunding Mortgage Bonds. Does their opposition, in and of itself, block the Commission's Plan, or any other so-called "merger plan", no matter how advantageous to the public and to the bondholders *as a class* the Plan may be?

Judges RUSSELL and BORAH adopted (II, 731-733; 201 F. 2d 331-332) what Judge SIBLEY had said in the District Court in disapproving the Previous Plan (V, 476; 31 F. Supp. 932):

> "I do not think Congress intended to force a merger undesired by a majority of the affected parties by permitting a merger to be part of a plan."

Judge SIBLEY's view was based solely on "the history of the legislation" (II, 475-476; 81 F. Supp. 932).

It is not a fact that the Commission's Plan is opposed by 99% in amount or number—or anything approaching 99%—of the security holders, of the bondholders or of the "affected parties". The petitioners' brief repeats and aggravates erroneous statements in the District Court's opinion on this subject (see below, p. 10-12; Appendix B).

The respondent's position is that:

As the majority of the Court of Appeals held, the provisions of Section 77 are plain and unambiguous and leave no doubt that a plan can be approved and confirmed over the opposition of the holders of a majority in amount of the First and Refunding Mortgage Bonds.

The background of the enactment of Section 77 and its revision in 1935, the evident policy of the Congress and the interpretation of Section 77 by parties, the Commission and the Courts all support this view.

There is no occasion for a reference to "the history of the legislation" cited by the petitioners, but that history does not support the petitioners' contentions.

II. The second question stated in the petition and brief (p. 3-4, 26-30) seems to involve the proposition that Rule 52(a) of the Federal Rules of Civil Procedure and the so-called "cram-down" provision of Section 77 (e), taken in combination, required the Court of Appeals to affirm Judge STRUM unless his findings were "clearly erroneous".

The respondent's position is that:

In view of this Court's decisions in *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448, *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943) 318 U. S. 523 and *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, the District Court's function was to decide whether the Commission had followed the statutory mandates and had had material evidence to support its conclusions. Since the District Court did not find that there were any changed conditions which made the Plan, if fair when approved by the Commission, subsequently unfair, there were no "findings" of the District Court to which Rule 52(a) applied.

If Rule 52(a) did apply, it would be enough that the majority of the Court of Appeals held (II, 729-730; 201 F. 2d 330)

> "• • • that the findings of the trial judge, rejecting the commission's findings as to the public interest and as to valuation, and declaring that the plan is unfair and inequitable, are themselves without support in law or in fact; • • •."

The minority of the Court of Appeals did not express any disagreement with this (II, 731-732; 201 F. 2d 331-332).

Were this Court to assume the arduous task which devolved on the Court of Appeals, this Court would agree

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that in so far as the District Court's findings are adverse to the Commission's Plan they are "without support in law or in fact" and hence "clearly erroneous".

The Petitioners' "Reasons for Granting the Writ".

The petitioners contend that there are "two important questions of Federal law which have not been, but should be, settled by this Court". As to that, the respondent's position has just been stated.

The petitioners stress the division (seven to three) in the Commission and the division among the Judges. The bases for the various dissents are summarized at pages 12-14 below.

STATUTES INVOLVED.

The statutes involved are Section 77 of the Bankruptcy Act (11 U. S. C. § 205) and Section 5 of the Interstate Commerce Act (49 U. S. C. § 5).

The pertinent portions are set forth in full in Appendix A hereto.

STATEMENT OF THE CASE.

In commenting on and supplementing the petitioners' statement, we will refer first to certain basic or general factors. We will then set forth a short narrative of the case.

(1) The Court of Appeals has sustained the Commission's findings that the Plan will serve the public interest and is fair, if not generous, to the holders of the Debtor's First and Refunding Mortgage Bonds.

The Commission found that the Plan would be "compatible with the public interest" (282 I. C. C. 187-188). It found that it would affirmatively serve the public interest in several respects: there would be large economies

from the unified operations, "betterment of service", "greater financial stability", and "a more adequate, economical and efficient transportation service" (*id.*). The Commission also found that "it would not be compatible with the public interest for the St. Joe Paper Company to control the debtor's property" (*id.*). The Commission's general findings on these points were supported by detailed discussions, with intermediate findings, in the Fifth Supplemental Report (282 I. C. C. 119-142), which supplemented discussions and intermediate findings in the Third Supplemental Report (267 I. C. C. 307-349). See also the Sixth Supplemental Report (282 I. C. C. 196-197).

Judge STRUM found (I, 157; 103 F. Supp. 842):

> "The Commission's findings as to public interest are wholly unsupported by evidence."

The Judge then went on to make many findings on subjects peculiarly within the Commission's province (several of them involving matters which have been committed to the Commission for decades) all opposite to, or at variance with, the Commission's findings (I, 157-165; 103 F. Supp. 842-846).

The Court of Appeals held that there was "abundant evidence" to support the Commission's findings (II, 7~~1~~27; 201 F. 2d 329) and that Judge STRUM's findings were "themselves without support in law or in fact" (II, 1~~3~~29-730; 201 F. 2d 330).

* * * * *

The Commission found that the Plan is "fair and equitable" to the creditors of the Debtor (282 I. C. C. 188). After a detailed discussion (282 I. C. C. 142-182) it found, in the terms of this Court's opinion in the *Milwaukee* case (318 U. S. 523, 565-566), that the Plan "will afford the creditors of the debtor the equitable equivalent of their existing rights in the property of the debtor" (282 I. C. C. 182).

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After Judge STRUM in the District Court had expressed a contrary view, the issue was fully argued in the Court of Appeals. Chief Judge HUTCHESON said (II, 728; 201 F. 2d 329-330):

> "[The record] shows a most careful and painstaking effort on the part of the commission to properly, adequately, and independently value both the securities held by the bondholders and those to be received by them in exchange and that its finding that the plan was fair and equitable finds full support in the evidence.
>
> "Indeed, an examination of all the testimony now available touching on and dealing with the valuations which under the statute it was for the commission to make, demonstrates, we think, beyond any peradventure that the commission's findings and estimates of the respective future earnings of East Coast and Coast Line and of the present and future values of the securities to be given in exchange for each other was most favorable to the bondholders of East Coast.
>
> "The same careful examination shows that but for the fact, which apparently dominates and controls most of the bondholders in this controversy, that they are primarily concerned not with obtaining value received for their securities but with a conversion of their bonds into a title to the East Coast properties, so that they will own and manage the railroad, all of them would be bound to agree that what they will receive for their bonds under the plan will be of a value equal to, or more than, that of their bonds."

The minority of the Court of Appeals did not express any disagreement (II, 731-733; 201 F. 2d 331-332).

(2) It is not correct that 99% of the bondholders, in amount or number, oppose the Plan.

Only a small number of bondholders, holding less than 70% of the First and Refunding Mortgage Bonds, have appeared in opposition to the Plan. All have had special reasons, not common to the bondholders as a class, for doing so.

The record supports the conclusion that hundreds of bondholders, holding over $10,000,000 of Bonds, would approve the Plan if properly informed about it.

The petitioners say four times (p. 3, 4, 28, 28) that the Plan is opposed by 99% of the bondholders, or of the security holders, or of the equitable owners of the property. At page 14 they say specifically:

> "The St. Joe Paper Co. and the Trustees of the trust created by the will of Alfred I. duPont hold about $25,000,000 of these bonds. The remaining $20,000,000 are held by various other groups who have appeared; all are opposed to this plan."

The statement in the second sentence is so indubitably wrong that we are at a loss to understand by what accident it ever found its way into the petitioners' brief.

We do not concede that it would make any difference if the statement were correct.[1] However, we do not wish to have the petition considered against a background of factual error, particularly an error which was thrice repeated by Judge STRUM (I, 138, 141, 166; 103 F. Supp. 833, 835, 847) and which crept into Judge RUSSELL's opinion in the form of a quotation from Judge STRUM (II, 732; 201 F. 2d 331).

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[1] We believe the law was correctly stated in *In re New York, New Haven & Hartford R. Co.* (C. C. A. 2, 1945) 147 F. 2nd 40, 49 and by Judge HOLMES on the prior appeal, *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.* 179 F. 2d 538, 547. Judge HOLMES said: "There is no provision of law for the court or judge to submit the plan to the creditors or to give any consideration before the vote is taken to how the creditors will vote on it."

BLEED THROUGH

The following table sets forth the situation which existed at the time of the hearing before Judge STRUM in the District Court and which, so far as the record shows, has not since been changed:[1]

		Per Cent
(1) St. Joe Paper Company	$23,259,000	
duPont Trust	1,993,000	
	$25,252,000	56.12
(2) Other Bondholder-Opponents Appearing by Counsel		
Lynch Interests	$ 2,672,000	
Welbon (Claughton) Group	2,220,000	
Conn Group	978,000	
	$ 5,870,000	13.04
(3) 73 Motions to Dismiss	$ 2,855,448	6.35
(4) Deposit Committee (for Plan)	437,900	.97
(5) Others	$10,584,652	23.52
	$45,000,000	100.00

The bondholders in categories (1) and (2), holding 69.16%, opposed the Plan in the District Court and the Court of Appeals. The reasons which motivated them are referred to in Appendix B, which also tells the curious story of the 73 motions to dismiss. The Deposit Committee, which has since disbanded, favored the Plan. As the table shows, the holders, of whom there were hundreds, of $10,584,652 of Bonds did not appear in the District Court or otherwise evidence any opposition to the Plan.

Judge STRUM treated all of the bondholders who were not represented by the Deposit Committee as opposed to the Plan, because the Trustees of the First and Refunding Mortgage opposed the Plan (I, 166; 103 F. Supp. 847).

[1] This table is made up from a tabulation which was submitted to the District Court by counsel for the duPont Trustees on February 11, 1952. Supporting detail will be found in Appendix B to this brief. The totals agree with those given in Judge STRUM's opinion (I, 166; 103 F. Supp. 847).

For this there was no warrant in fact or in law, since neither the First and Refunding Mortgage nor Section 77 authorized the Trustees of the First and Refunding Mortgage to bind the unrepresented bondholders (Appendix B, p. xiv-xvi). As noted in Appendix B, the Trustees of the First and Refunding Mortgage conceived it to be their duty to be guided by the holders of a majority in amount of the Bonds and consequently they were in no sense representatives of, or spokesmen for, the holders of the $10,584,652 of Bonds (*id.*).

• • • • •

The Commission and the Court of Appeals have found that the Plan is fair, if not generous, to the bondholders. If this finding be correct, it is to be presumed that the unrepresented holders of the $10,584,652 of Bonds, of whom there are hundreds, would favor the Plan if they were fairly informed about it and expressed themselves. They are not interested in control. And presumably they are interested in having a reorganization, under which they will receive fair treatment, completed without further delay.

(3) The division within the Interstate Commerce Commission did not relate to either of the petitioners' two questions.

The first question presented in the petition is as to the power to have a so-called "forced merger" (Petitioners' Brief, p. 2-3).

The petitioners' argument is based on their view of the legislative history of certain provisions of Section 77 (p. 15-26). The legislative history argument against so-called "forced mergers" was made before the Commission on the reargument in January, 1948 which intervened between the Commission's Third and Fourth Supplemental Reports.[2] In the Fourth Report a majority of the Commission

[2] See transcript of argument January 8, 1948 (p. 4993-5007) and January 9, 1948 (p. 5202-5206). This transcript is one of the unprinted portions of the record (I, 189).

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discussed and rejected the legislative history argument (267 I. C. C. 730-732). The minority opinion was wholly silent on the subject (267 I. C. C. 745-747). The same thing is true of the minority opinions in the Fifth and Sixth Reports (282 I. C. C. 189-191; 282 I. C. C. 212). Not a single Commissioner has ever expressed agreement with the legislative history argument against a "forced merger".[1]

Of course, the second question presented was not one on which the Commission has had any occasion or duty to pass.

(4) The division in the Court of Appeals related solely to the question of the power to have a so-called "forced merger".

Neither of the minority Judges expressed approval of any of Judge Strum's findings.

Judge RUSSELL set forth in his dissenting opinion *"the reason"* why he and Judge BORAH dissented.[2] That reason was that they agreed with Judge SIBLEY that the legislative history showed that the Congress did not intend to authorize a "forced merger" (V, 475-476; 81 F. Supp. 932).

Judge RUSSELL and Judge BORAH did not express agreement with Judge STRUM that, if there were a power to approve a "forced merger", the Commission had not properly exercised that power. In other words, they did not express any disagreement with the majority that Judge STRUM's findings were "without support in law or in fact" (II, 731-733; 201 F. 2d 331-332).

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[1] A minority of the Commission thought that the Commission's Plan and the Previous Plan violated the absolute priority rule (267 I. C. C. 745-746; 282 I. C. C. 189-190; 282 I. C. C. 212), but the minority was plainly in error as to that for the reasons which were stated by the majority in the Third Supplemental Report (267 I. C. C. 306).

[2] In the second sentence of his opinion Judge RUSSELL said that "at least some bare outline of *the reason* for disagreement seems obligatory" (italics supplied). He then referred solely to the question of power to have a so-called "forced merger" and adopted Judge SIBLEY's holding (II, 731-732; 201 F. 2d 331-332).

As the petitioners recognize, Judge STRUM did not hold that a "forced merger" was illegal; the question was not before him, because he was bound by the decision of the Court of Appeals on the prior appeal (Petitioners' Brief, p. 12).

Judge SIBLEY, who has retired, has had no connection with the case since 1949 and accordingly has had nothing to do with the present Plan.

(5) A Narrative Statement of the Case.

The Florida East Coast Railway Company has been in the hands of the Court since August 31, 1931, over 21 years ago, when it went into equity receivership.

Since January 25, 1941, over 12 years ago, it has been the Debtor in the Section 77 proceeding. Some of the earlier history of the proceeding is set forth in the footnote at pages 2-3 above.

In November, 1944, the Atlantic Coast Line first intervened and supported a plan, proposed by the Lynch Interests, under which the Coast Line would have obtained control of a new Florida East Coast.[1] On January 8, 1945 the Commission rejected the plan (261 I. C. C. 187-193), and approved a plan for an "internal" reorganization under which the Atlantic Coast Line would have had no interest in the reorganized company (261 I. C. C. 151-193).[2]

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[1] The Petitioners' Brief states (p. 8):

"In November 1944 a suggestion was first made to the Commission to certify a plan which would involve transfer of the properties of the Florida East Coast Railway to the Atlantic Coast Line."

This is incorrect, as appears from the summary of the proposed plan in the Commission's Second Supplemental Report (261 I. C. C. 188-189). The Lynch plan contemplated that the property of the Florida East Coast would be owned and operated by a new corporation to be controlled by the Atlantic Coast Line; it did not contemplate a transfer of the properties to the Atlantic Coast Line.

[2] The Petitioners' Brief (p. 8) refers to statements at 261 I. C. C. 191 about the Atlantic Coast Line's record for the years 1932, 1933, 1934, 1935 and 1938 and the undesirability of increasing

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Several of the parties, including the St. Joe Paper Company and S. A. Lynch, filed petitions for modifications of the plan of January 8, 1945 and in "most of the petitions requests for further hearings were made" (267 I. C. C. 295-296). After an argument on May 29, 1945, the Commission on July 20, 1945 reopened the proceeding for the receipt of evidence relating to modifications of the plan of January 8, 1945 "and for the proposal of other plans" (267 I. C. C. 296).

Proceedings Before the Commission in Connection With the Previous Plan, 1945-1948.

After the proceeding was reopened on July 20, 1945, the Atlantic Coast Line proposed a plan which called for a unification of the two railroads by a merger, consolidation or transfer of the properties of the Florida East Coast to the Atlantic Coast Line (267 I. C. C. 297-298). Other parties proposed modifications of the Commission's plan of January 8, 1945. Hearings were held in Washington and West Palm Beach in November, 1945, lasting 16 days; briefs were filed in February, 1946; the Examiner issued a proposed report in June, 1946; exceptions to the proposed report, briefs and reply briefs were filed; there was an argu-

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the Atlantic Coast Line's fixed charges. When those statements were made in the Commission's Second Supplemental Report there had been no hearing, because the Commission decided not to reopen the proceeding at that time (261 I. C. C. 187-193). The proceeding was subsequently reopened and a hearing held, and the Commission then made much fuller and more informative statements about the Atlantic Coast Line's record of earnings (267 I. C. C. 339-343).

The Petitioners' Brief also refers to a statement which the Commission made about the Soo Line reorganization (252 I. C. C. 525) and suggests that the Commission "was not persuaded that it had power to force a merger, without the consent of the equitable owners of the Florida East Coast". That was prior to this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495, construing the "cram-down" provision, and there were differences of view as to what this Court's construction of the "cram-down" provision would be.

ment before the full Commission in October, 1946, lasting for two days; and under date of April 8, 1947 the Commission issued its Third Supplemental Report approving, by a vote of five to four, a plan which provided for a unification of the Florida East Coast and the Atlantic Coast Line (267 I. C. C. 295-391). The terms of the plan were materially different from those which the Atlantic Coast Line had proposed.

After the filing of petitions for modifications, for a reargument and for a reopening of the case, the Commission ordered a reargument which lasted for two and one-half days in January, 1948. In the Commission's Fourth Supplemental Report, issued on March 25, 1948, it affirmed its approval of the plan (the Previous Plan) by a vote of six to five (267 I. C. C. 729-759) and that plan was then certified to the District Court.

Proceedings in the District Court on the Previous Plan, 1948-1949: Judge Sibley's Decision.

Because of the illness of Judge STRUM, the District Judge who had charge of the case, Circuit Judge SIBLEY was designated under 28 U. S. C. § 291(c) to pass on the objections to the Previous Plan.

After a hearing on January 10-14, 1949, Judge SIBLEY handed down an opinion on January 22, 1949 (V, 466-481; 81 F. Supp. 926-935).

Judge SIBLEY's crucial holding was as follows (V, 476; 81 F. Supp. 932):

> "I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by permitting a merger to be part of a plan."

This is the view which was adopted by Judges RUSSELL and BORAH in their dissent below (II, 731-733; 201 F. 2d 331-332).

Judge SIBLEY's view, thus adopted by the minority below, was based solely on his understanding and inter-

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pretation of "the history of the legislation" (V, 475-476; 81 F. Supp. 932).

Judge SIBLEY made two other rulings to which the petitioners refer (p. 11), but they have no present relevance.

The Prior Appeal to the Court of Appeals and This Court's Denial of Certiorari, 1949-1950.

An appeal was taken to the Court of Appeals by the Atlantic Coast Line, and the Deposit Committee which has since disbanded. *Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 179 F. 2d 538. The appeal was heard by Judges HUTCHESON, HOLMES and RUSSELL.

Judges HUTCHESON and HOLMES disagreed with Judge SIBLEY's view that the objection of a "majority in amount of the affected parties" was fatal to a so-called "merger" plan. Judge RUSSELL agreed with Judge SIBLEY.

Judges HUTCHESON and RUSSELL thought that the Commission had been preoccupied with questions of the public interest, particularly that of control, and that it had accordingly not taken due care in discharging its responsibility of providing fair and equitable treatment for the bondholders. Judge HOLMES disagreed and voted for approval of the Plan.

The result was a remand of the case to the Commission on the following terms, which were stated in Judge HUTCHESON's opinion (179 F. 2d 544):

> "In remanding the case, however, for further proceedings, we remand it for the purpose of working out a really fair and equitable plan and without prejudice in doing so to the due consideration of any fair and equitable plan for bringing this matter to an end, including such a plan providing for a merger with, or sale to, the Coast Line either with or without the approval of the security holders."

The Atlantic Coast Line and the Deposit Committee then filed a petition for a writ of certiorari, which was denied. *Atlantic Coast Line Railroad Co.* v. *St. Joe Paper Co.* (1950) 339 U. S. 929. The petition was opposed by

St. Joe Paper Company and F. K. Conn, two of the present petitioners, and also by the Lynch Interests and the Trustees of the First and Refunding Mortgage. The other parties stood mute.

Further Proceedings Before the Commission, 1950-1951, and the Approval of the Plan.

Further hearings were held by the Commission on July 11-14 and August 8-17, 1950 (282 I. C. C. 82), thirteen days in all, at which 2241 pages of testimony and 157 exhibits were added to the record (201 F. 2d 327).

New or modified plans were submitted by the St. Joe Paper Company, Atlantic Coast Line Railroad Company, F. K. Conn, the Welbon (Claughton) Group and an employees' group (282 I. C. C. 82-99).

On July 12, 1951 the Commission issued its Fifth Supplemental Report, which is printed at the front of Volume I of the record and is, of course, one of the most important documents in the case. *Florida East Coast Railway Company Reorganization,* 282 I. C. C. 81-191. Seven Commissioners concurred in the Report and only three dissented; one Commissioner did not participate. The Report approved a Plan which, while similar in type to the Previous Plan and to the plan proposed by the Atlantic Coast Line after the remand, differed from both.[1]

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[1] The Previous Plan provided in Section IX that the Atlantic Coast Line should issue cash and securities aggregating $40,500,000 in face amount (267 I. C. C. 750). The plan which the Atlantic Coast Line proposed after the remand provided in Section IX for cash and securities totaling $42,342,186 in face amount (282 I. C. C. 88). The Plan approved by the Commission provided in Section IX for cash and securities of $46,500,000 in face amount (282 I. C. C. 216). The Common Stock of the Atlantic Coast Line was originally $100 par value; on May 6, 1946 it was changed to no par value (see Exhibit No. 298 in the Interstate Commerce Commission record, I, 183). In the figures just given we have treated the stock as if it were $100 par value.

As indicated elsewhere, the differences between the plans are not measured solely by differences in par amounts of the cash and securities provided for in Section IX of each of them.

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The Atlantic Coast Line filed a petition for modifications asking the Commission, among other things, to reduce the securities which it would have to provide under the Plan. Petitions for different modifications were filed by other parties. After considering the petitions, briefs and reply briefs, the Commission made certain minor modifications and approved the Plan as thus modified in its Sixth Supplemental Report dated October 25, 1951 (282 I. C. C. 195-212). The Atlantic Coast Line's petition for a reduction in the "price" was denied. The Plan was then certified to the District Court.

As the majority of the Court of Appeals said (and the minority did not disagree), the record, including the Commission's Reports, shows "a most careful and painstaking effort on the part of the Commission" (II, 728; 201 F. 2d 325). Among other things, the Commission made a new forecast of the normal earnings of the Florida East Coast (282 I. C. C. 99-112), a forecast of the normal earnings of the Atlantic Coast Line (p. 146-148), a new estimate of the economies which would be realized from a unification (p. 135-142) and findings as to the fair market value of the securities which would be issued under various plans, including the Plan which the Commission eventually approved (p. 154-158, 162-163). The Commission reconsidered the objections made by the Railway Labor Executives' Association, on behalf of the employees, although the Association offered no additional evidence (p. 134-135). The Commission also reconsidered the objections of the Southern Railway System and the Seaboard Air Line Railway Company in the light of additional evidence which was offered at the hearings (p. 140-142).

The Commission's Performance of Its Functions; Judge Strum's Criticisms of the Commission; and the Court of Appeals' Appraisal.

When Judge STRUM in the District Court wrote his opinion, he was caustically critical of the Commission's per-

formance of its functions (I, 127-168; 103 F. Supp. 825-847). The opinion is so full of examples that it would be superfluous to cite any.

None of the Judges of the Court of Appeals indicated that he agreed with Judge STRUM, and the majority of the Court, for whom Chief Judge HUTCHESON spoke, expressed unqualified approval of the Commission's "most careful and painstaking effort" (II, 728; 201 F. 2d 329).

The Terms of the Plan: The Petitioners' Comparison with the Previous Plan.

The petitioners' summary of the Plan and their comparison with the Previous Plan (p. 12-14) are incomplete and in some respects erroneous.

However, as the bearing of the summary and comparison and any deficiencies therein on the petitioners' two questions seems remote, we have included our comments on the summary and comparison in Appendix C hereto rather than in the body of this brief.

The Development by the Opponents of the Commission's Plan of the Program for a Dismissal of the Section 77 Proceeding and Their Agreement on the Alternative Equity Plan.

Between the time when the Commission issued its Sixth Supplemental Report on October 25, 1951 and the hearings in the District Court on the objections to the Plan, in February, 1952, there was a unique development in the proceeding.

A so-called "Bondholders' Agreement" was reached relating to a proposed dismissal of the Section 77 proceeding and the carrying out of a new plan in the ancient and comatose equity receivership, which was to be reactivated for that purpose (I, 25-39). The St. Joe Paper Company, the duPont Trustees, F. K. Conn and his associates, the Welbon (Claughton) Group and the Lynch

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Interests all became parties to the Agreement and sponsored the program of dismissal. It has never been disclosed who originated the Agreement, or what negotiations were carried on, because no one took the stand at the hearings before Judge STRUM in the District Court who could be cross-examined about the Agreement and the alternative equity plan.

Under the Agreement the parties undertook to petition the Court to direct the transfer of "possession of the debtor's property to Scott M. Loftin, one of the prior receivers in the case of *Bankers Trust Co., et al., as Trustees* v. *Florida East Coast Railway Company,* Consolidated Cause No. 757-Eq. herein called the receivership proceeding, and to John W. Martin, as Co-Receiver" (I, 25-26). Former Senator Loftin and former Governor Martin had both been appointed Trustees in the Section 77 proceeding by Judge STRUM; Senator Loftin was "one of the prior receivers" but Governor Martin was not a receiver at all.

The signers of the Agreement also bound themselves to ask the Court to approve the alternative equity plan.

Under that plan there would be an internal reorganization: a new company with $20,000,000 new fixed interest 4% Mortgage Bonds, convertible into Common Stock, and $25,000,000 Common Stock (I, 28-36).

There would be a voting trust for five years with one of the Trustees "being a receiver of the debtor's property"—that is, either Senator Loftin or Governor Martin—and another "a holder of first and refunding mortgage bonds selected by the Court and not connected with the St. Joe Paper Company"; the third would be selected by the St. Joe Paper Company (p. 36). However, the Voting Trustees were apparently expected to vote the stock as directed by the holders of the Voting Trust Certificates so that real control would be lodged in St. Joe-duPont and the Voting Trusteeships would be sinecures (p. 36-37).

All of the little groups who opposed the Plan, and who

subsequently became appellees in the Court of Appeals, were to have the privilege of naming one or two Directors: the Lynch Interests, two; Conn, one; and the Welbon (Claughton) Group, one (p. 37). It may seem inconceivable that this feature of the alternative equity plan should have been important, but there are solid grounds for thinking that it was (see Appendix B). Their right to have Directorships was not to be contingent on their having any substantial holdings of the new stock or Voting Trust Certificates—under the plan it would be sufficient if they had mere nominal holdings (Appendix B, p. vi-vii).

Most important, the bondholders other than the St. Joe Paper Company would have the right to receive new bonds, on the basis of $1,000 principal amount of new bonds for each $1,000 principal amount of First and Refunding Mortgage Bonds, while the St. Joe Paper Company would have the right to receive only new common stock on the basis of 10 shares of common stock for each $1,000 of First and Refunding Mortgage Bonds. At the hearing in the District Court in February, 1952, there was uncontradicted expert testimony that, based on the conditions then existing, the new mortgage bonds would sell between 85 and 90 and that "the common would be unlikely to sell for more than twenty-five" a share (II, 578).[1]

Despite this extraordinary and unique provision for inequality of treatment, the alternative equity plan would still not have been as favorable to the holders of the $20,000,000 of Bonds as the Commission's Plan would be (see below at page 56).

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[1] This means that, taking the higher figure for the Bonds, the new securities would have a market value of $24,250,000, made up of $18,000,000 for the bonds and $6,250,000 for the stock. If there were equality of treatment, St. Joe-duPont as the holders of $25,252,000 of First and Refunding Mortgage Bonds would be entitled to $13,608,022 market value of new bonds and stock and the holders of the other $20,000,000 of First and Refunding Mortgage Bonds would be entitled to the balance. Instead St. Joe-duPont would take $6,313,000 market value in stock, which is $7,295,022 less than their *pro rata* share. What they would give up would go to the others (see Appendix B).

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The provisions of the alternative equity plan conflicted directly with several important findings of the Commission relating to the public interest:

First, the plan provided for a much larger amount of new fixed interest bonds than the Commission had indicated that it would be willing to approve (282 I. C. C. 158).

Second, the plan contained no provision for a reserve for new stations, particularly a new Miami station, the necessity for which had been recognized in the plan of January 8, 1945 (261 I. C. C. 166-167), and in the Previous Plan (267 I. C. C. 360-364) as well as in the Plan which the Commission had just certified to the Court (282 I. C. C. 168-173).

Third, the plan contemplated control of the reorganized company by the St. Joe Paper Company (267 I. C. C. 389; 282 I. C. C. 187).

Until the Bondholders' Agreement came into being the groups who objected to the Previous Plan and the Commission's Plan had never been in agreement *for* any other one plan; they had only been in agreement *against* the Commission's Plans.

The Hearing in the District Court and Judge Strum's Opinion.

While the proceedings had been pending before the Commission, Judge STRUM, who had been in charge of the case in the District Court, was appointed to the Court of Appeals. However, he was designated pursuant to 28 U. S. C. § 291(c) to hold the District Court and he continued in charge of the case, so that when the Plan was certified to the District Court the hearings were held before him on February 4-13, 1952.

On March 11, 1952 Judge STRUM issued an order (I, 168-170) whereby he (1) disapproved the Commission's Plan, (2) dismissed the Section 77 proceeding effective June 1, 1952, (3) stated that appropriate orders would be

entered in the old equity receivership to effect a reorganization through the foreclosure of the First and Refunding Mortgage, and (4) directed Senator Loftin and Governor Martin, as Trustees in the Section 77 proceeding, to turn over the property and records of the Debtor on June 1, 1952 to themselves as Receivers in the equity receivership.*

This order was accompanied by an opinion which takes up 41 pages in the record (I, 127-168) and 20 pages in the Federal Supplement (103 F. Supp. 825-847). With respect to the opinion and its contents the Court of Appeals said:

> The opinion, "if given effect, would rewrite the law of the case" as it had been declared and established by the Court of Appeals (II, 718; 201 F. 2d 325).
>
> Judge STRUM made findings "that an internal reorganization would not be contrary to the public interest and that there was no evidence to support the commission's finding that the merger as proposed by it was in the public interest and that an internal reorganization as proposed by the bondholders was not" and he had also "made findings of his own on the issue of valuation directly contrary to the findings of the Commission" (II, 723; 201 F. 2d 328).
>
> An impasse had been reached. The question was "whose is the fault?" (II, 724-725; 201 F. 2d 328). The answer of the Court of Appeals, in effect, was that the fault was Judge STRUM's, not the Commission's.
>
> "The findings of the trial judge, rejecting the commission's findings as to the public interest and as to valuation, and declaring that the plan is unfair and inequitable, are themselves without support in law or in fact" (II, 729-730; 201 F. 2d 330).

In addition, the Court of Appeals made the findings which we have quoted above at page 9.

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* As a result of the filing of a supersedeas bond, the dismissal of the Section 77 proceeding and the turnover to the equity receivers were stayed.

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Judge STRUM's opinion contains so many erroneous statements that it would unduly lengthen this brief even to list them. However, at pages 53-62 below we discuss briefly Judge STRUM's treatment of the principal matters in which the petitioners are interested.

ARGUMENT

I.

THE POWER IN A SECTION 77 PROCEEDING TO APPROVE AND CONFIRM A PLAN OF REORGANIZATION PROVIDING FOR A SO-CALLED "FORCED MERGER" IS CLEAR.

Two preliminary observations may be made about the discussion of the first question in the petitioners' brief:

First, there is no definition of, and no consistent concept of what is meant by, such words as "forced", "force", "compulsory", "compel", "consent" and "request". The brief does not consider *under what circumstances* a consent is required to effect a merger, consolidation or other unification, or *whose* consent is required.

Second, the references to *the present statutes* are quite inadequate.

We attach as Appendix A quotations of the pertinent parts of Section 77 and of Section 5 of the Interstate Commerce Act.

The Plan authorizes a unification by merger, consolidation or transfer.

In the testimony, briefs, reports and opinions in this case there have generally been references to a "merger".

Actually the Plan provides for a merger, consolidation or a transfer and conveyance by the Trustees of the Debtor to the Atlantic Coast Line Railroad Company (282 I. C. C. 213). The same thing was true of the Previous Plan (267 I. C. C. 748).

We will use the term "unification" where it makes no difference which method of effecting a unification is followed.

The relationship of Section 77 of the Bankruptcy Act and Section 5 of the Interstate Commerce Act with respect to the public interest aspects and the private interest aspects of a unification.

The petitioners' brief relies almost exclusively on the legislative history of the so-called "consistency clause" of subsection (f) of Section 77, which refers to the "provisions and purposes" of the Interstate Commerce Act.

The discussion in the brief fails to distinguish adequately between the *public interest aspects* of a unification and what may be called the *private interest aspects.*

It is clear that the consistency clause in Section 77 as revised in 1935 and the predecessor clauses in the original 1933 Act were intended *only* to make sure that, in deciding what would be "compatible with the public interest" with respect to a Section 77 plan providing for a unification of two or more railroads, the Commission's decision would not be inconsistent with the decision it would make as to such *public interest aspects* if the unification were before it on a Section 5 application.

That has been the Commission's interpretation of the "consistency clause" (267 I. C. C. 301-302, 308-310).

The consistency clause refers to the Interstate Commerce Act "as on August 25, 1935 or thereafter amended" (Appendix A, p. v). It is suitable, therefore, to examine the Interstate Commerce Act as it now reads, although our position does not rest on any amendments of the Act since August 25, 1935.

Section 5(c) of the Act specifically refers to certain considerations of the public interest, "among others" (Appendix A, p. vi-vii):

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> "(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Subsections (d), (e) and (f) then implement clauses (2), (3) and (4) respectively, of subsection (c), dealing with the inclusion of other railroads, fixed charges and employees (Appendix A, p. vii-viii).

The *private interest aspects* of a unification may be said to involve these questions:

> (1) Is the consent of all or any of the stockholders necessary? What provision, if any, is there for dissenting stockholders?
>
> (2) Is the consent of all or any members of a class of creditors, secured or unsecured, necessary? What provision, if any, is there for dissenting creditors?

In listing the *private interest aspects* we have said nothing about any "request" or "consent" of "the carriers involved" (Petitioners' Brief, p. 18), because whether a "carrier", the corporate entity, has to "request" or "consent" is a mere matter of procedure (see below pages 31-33).

The subjects of consents of stockholders or creditors, and of the provision for dissenters, were not touched by the Interstate Commerce Act at all until the amendment of that Act by the Transportation Act of 1940, which was considered by this Court in *Schwabacher* v. *United States* (1948) 334 U. S. 182; the Interstate Commerce Act deals with *solvent* corporations and the entire field of "consents" and the application of "force" being left to state

law. The Transportation Act of 1940 added Section 5(11) and as a result Section 5 of the Interstate Commerce Act now covers the subjects of the consent of stockholders and provision for dissenting stockholders to the limited extent determined in *Schwabacher* v. *United States.*

Section 77 and Section 5 of the Interstate Commerce Act are linked together, through the "consistency clause", to the extent that is necessary to insure consistency in *public interest aspects* of a unification, but they have separate fields as to *private interest aspects.* Section 77 governs the treatment of stockholders and creditors of a debtor in a Section 77 proceeding. Section 5 governs as to stockholders of a solvent corporation to the extent prescribed in Section 5(11). Otherwise state laws determine the rights of stockholders and creditors.

The distinction can be pointed up by a quotation from Justice FRANKFURTER's dissent in *Schwabacher* v. *United States* (334 U. S. p. 206):

> "The Commission was charged with seeing to it that the very limited requirements of § 5 (2) were observed, and to that end was given 'exclusive and plenary' authority. § 5 (11). The purpose was to authorize a voluntary arrangement, to sanction an agreement, not to formulate a plan and to coerce its adoption, as is true of § 77. The law specifically enumerates the requirements that constitute the 'public interest' which the voluntary agreement must satisfy to secure the Commission's approval. These are: the effect of the proposal on the public transportation service; the effect of including or failing to include other railroads in the plan; the resulting fixed charges; and the interest of the carrier employees affected. * * * The great difference between these requirements and the detailed and comprehensive provisions of § 77, 11 U. S. C. § 205, carries a sharp legal contrast between the authorization which Congress required for voluntary mergers and the coercion of an imposed plan of reorganization in the case of insolvent roads."

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While this quotation is from a dissenting opinion, all will agree that there are vast differences between the sanctions imposed by Section 77 against creditors and stockholders and those imposed by Section 5 against dissenting stockholders.

The Commission's statements were clear (267 I. C. C. 731-732):

> "The language used in subsection (f) is 'not inconsistent with.' The approved merger plan is not inconsistent with the Interstate Commerce Act. There is no prohibition in the Interstate Commerce Act against the merger of an insolvent railroad with a solvent railroad. We may, pursuant to our power under Section 77 of the Bankruptcy Act to deal with bankrupt railroads, promulgate a plan which provides that the bankrupt shall be merged with a solvent corporation, and the court which has jurisdiction of the bankrupt's property may confirm the plan. The solvent corporation here is willing. There is nothing in the Interstate Commerce Act to prohibit us from approving such a transaction."

(A) The petitioner's proposition is that so long as the St. Joe Paper Company and the duPont Trustees own a majority of the First and Refunding Mortgage Bonds, there cannot be a plan under Section 77 for the unification of the Florida East Coast and the Atlantic Coast Line (or any other corporation), except with the consent of St. Joe-duPont, no matter how advantageous to the public interest and to the other bondholders such a plan might be.

Judge SIBLEY said (Petitioners' Brief, p. 10; V, 476; 81 F. Supp. 932):

> "I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by permitting a merger to be part of a plan."

That is the opinion which Judges RUSSELL and BORAH adopted (II, 731-733; 201 F. 2d 331-332).

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While no one in the case has ever defined "the affected parties", and the Plan affects two other classes of creditors besides the holders of the First and Refunding Mortgage Bonds, we take it that the petitioners regard the holders of the First and Refunding Mortgage Bonds, whom they call "the equitable owners of the property" (p. 28), as "the affected parties". The statements in the petitioners' brief about other classes of creditors, particularly the holders of the unsecured claims, are conflicting and erroneous (p. 9, 28) but we cannot believe that the errors make any difference.[1]

The petitioners' proposition, then, is that neither the Commission's Plan, nor any other plan for a unification with the Atlantic Coast Line or any other railroad, can be approved without St. Joe-duPont consent even though (1) such a plan be in the public interest and any internal plan to which St. Joe-duPont would consent would be against the public interest and (2) the First and Refunding Mortgage Bondholders *as a class* would receive far more favorable treatment than under an internal plan.

(A)(1) Notice was given to the Governors of the States served by the railroads and the communities and shippers had an opportunity to be heard.

This was proper so as to insure consistency with the Interstate Commerce Act as to public interest aspects of the unification.

The petitioners say of the Interstate Commerce Act as it read in 1933 (p. 18-19):

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[1] There are large amounts of unsecured claims, and the unmortgaged assets have been valued by the Commission at over $1,000,000 (282 I. C. C. 176-181).

Another class which is affected, at least in the sense that it is entitled to vote on the Plan, consists of the holders of the First Mortgage Bonds, of which $8,189,000 are outstanding in the hands of the public. The bonds would be paid in cash (282 I. C. C. 222-223), but the holders would be affected because the bonds are non-callable and do not mature until June 1, 1959.

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"The Act also recognized that owners of the debtor's securities were not the only persons interested in mergers of railroads, but communities and shippers in each state had a vital interest and that was why Title 49 of the Interstate Commerce Act required notice of a proposed merger to be served on the Governors of the states involved."

And they refer twice more to "giving a hearing to the communities and people served by the lines" (p. 20, 24).

Notice of the hearing on the proposed unification was given to the Governors of the various states by the Commission on November 1, 1945 after the filing of the Atlantic Coast Line's first plan proposing a unification and prior to the first hearings thereon. At the subsequent hearings many days were devoted to testimony on behalf of communities and shippers and that testimony was reviewed at length in the Commission's Third Supplemental Report (267 I. C. C. 318-320, 327-335).

By giving notice to the Governors of the states and receiving testimony on behalf of the communities and shippers the Commission followed a practice which was consistent with the practice followed in connection with unifications under the Interstate Commerce Act. It insured that there would be an opportunity for those who were interested in the national transportation service to be heard on questions affecting the public interest (267 I. C. C. 301-302, 308-310).

(A)(2) Section 5 of the Interstate Commerce Act has never contained any requirement for "the consent of the carriers involved" which has any bearing on the question presented.

It would be absurd to say that the legality of the Commission's Plan is dependent upon the consent of the Florida East Coast Railway Company, the Debtor, which is a mere corporate shell.

Time and again the petitioners assert that under the Interstate Commerce Act there cannot be a unification of

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two railroads except at the request, or with the consent, of "the carriers involved" (p. 18, 19, 20, 23).

Whether a carrier will take any action in connection with a unification will depend upon its stockholders, who elect its directors. It is a matter of substance what stockholder consent, if any, is required for a unification; it is a mere matter of procedure whether a "carrier", the corporate entity, must consent.

The carriers involved here are Atlantic Coast Line Railroad Company and Florida East Coast Railway Company, the Debtor. It is unthinkable that the petitioners mean to assert that the consent of the Florida East Coast Railway Company, the Debtor, is necessary: they do not say so except perhaps by referring to "the consent of the carriers involved". Florida East Coast Railway Company, the Debtor, is a mere corporate shell. Since 1942 the Commission has repeatedly held that the Debtor's stock is without value and the sole holder of the stock has never objected.[1]

Moreover, Section 5 of the Interstate Commerce Act, on which the petitioners rely, would not require the consent of Florida East Coast Railway Company, the Debtor, even if directly applicable to the Plan, and any implication otherwise in the petitioners' brief is incorrect. Section 5(2)(a)(1), in the form in which it existed in 1933 (Petitioners' Brief, p. 17-18) and in its present form (Appendix A, p. v-viii), requires Commission approval for "any carrier • • • to purchase • • • the properties • • • of another" and Section 5(2)(b) requires "the carrier or carriers or persons seeking authority" to present an application to the Commission. The Commission has correctly construed this to mean that the application should be filed by the trans-

[1]252 I. C. C. 423, 465; 252 I. C. C. 731, 745; 261 I. C. C. 151, 172, 194; 267 I. C. C. 295, 383; 267 I. C. C. 729, 756; 282 I. C. C. 81, 185; 282 I. C. C. 195, 224.

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feree carrier and not by the transferor carrier.[1] As already noted (p. 25), the Plan in this case can be carried out by a transfer and conveyance by the Trustees of the Debtor to the Atlantic Coast Line, and, even if Section 5 were directly applicable, no application to the Commission by Florida East Coast Railway Company, the Debtor, would be required.

Of course, ordinarily a carrier would not apply for authority to purchase the assets of another *solvent* carrier unless the latter were prepared to sell, and the latter's ability to sell, and the form of its "consent" to the transaction, would depend upon state law. When, however, a carrier whose property is to be transferred is in reorganization under Section 77, the authority of the Commission and the Court to approve and confirm a plan providing for a transfer of a debtor's property fills the place of the "consent" which would be required of a solvent carrier and the carrying out of such a transfer is not dependent on state law.

(B) Section 77 of the Bankruptcy Act clearly authorized the approval of the Plan despite the opposition of St. Joe-duPont, the holders of a majority in amount of the First and Refunding Mortgage Bonds.

The pertinent part of Section 77(b)(5) in its present form (Appendix A, p. i) is not quoted in the petitioners'

[1] Thus in *Erie Railroad Company Purchase* (1943) 254 I. C. C. 486, when an application was filed by Erie Railroad Company for authority to purchase the properties of The New York and Greenwood Lake Railway Company, The Caldwell Railway Company and The Roseland Railway Company, and applications were filed by the three latter companies for authority to sell their properties to Erie Railroad Company, the Commission granted the application of the Erie Railroad Company and dismissed the other applications. The Commission said (p. 490):

> "We are of the opinion that the statute does not require the vendor to seek our approval of the sale, and therefore any authorization we grant should be directed or limited to the Erie".

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brief but was quoted by Judge HUTCHESON (II, 725-726; 201 F. 2d 329, italics supplied):

> "Turning, for the correct answer to this question, to the record as it now stands before us, we are not in any doubt that, under the plain terms of subsection (b) (5) of Sec. 77 of the Act, 11 U. S. C. A. § 205, which provides that *the plan 'may include, the transfer of any interest in, or control of [all or] any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations* * * *', the commission was precisely authorized to formulate and recommend a plan providing, as the fourth plan does, for the merger of East Coast and Coast Line."

The petitioners suggest (p. 20-21) the possibility that the words "another corporation" in Section 77(b)(5) were intended to refer only to a corporation organized to carry out the plan. When the Commission answered a similar contention in 1948 it said, among other things (267 I. C. C. 730):

> "No such qualification is suggested by the language itself, and the statutory language must prevail. Had Congress intended to impose such a limitation on our power, the assumption is that it would have added the necessary language to make effective that restriction."

In *Alton Railroad Company Reorganization* (1945) 261 I. C. C. 343, the Commission approved a Section 77 plan, which was subsequently carried out and under which the Alton was transferred to the Gulf, Mobile and Ohio, an existing so-called "outsider" railroad corporation like the Atlantic Coast Line in this case.

The provisions of subsection (e) relating to approval of a plan by the Commission and the Court (Appendix A, p. ii-iv), which were authoritatively construed by this Court in the *Western Pacific* case, 318 U. S. 448, and the *Mil-*

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ukee case, 318 U. S. 523, relate to any plan which has attributes prescribed in Section 77(b)(5).

The "cram-down" provision of subsection (e) (Appendix A, p. iv; Petitioners' Brief, p. 26-27), which was finitively construed by this Court in the first *Denver & o Grande* case, 328 U. S. 495, applies to any plan which s been approved.

We come then to the so-called "consistency clause" of bsection (f), on which the petitioners stand. That clause ads as follows (Appendix A, p. iv-v, italics supplied):

> "Upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and *not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.*"

fter reading the clause, the logical next step is to examine ne pertinent provisions of Section 5 of the Interstate Commerce Act (Appendix A, p. v-ix).

The petitioners' theory is that it would be "inconsistent with the provisions and purposes" of Section 5 to have a unification of the Florida East Coast and the Atlantic Coast Line under Section 77 of the Bankruptcy Act over the objection of the holders of a majority in amount of the First and Refunding Mortgage Bonds. But the "provisions and purposes" of the Interstate Commerce Act have nothing to do with the consents or objections of bondholders, whether the bondholders be "equitable owners" or not. The Act deals, as we have noted above at pages 26-29, only with matters affecting the public interest except to the limited extent that Section 5(11) deals with stockholders.

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(C) The petitioners' theory, which Judge Sibley adopted, about the effect of Section 77 as originally enacted in 1933 and the alleged accidental misplacement of the consistency clause, is plainly untenable.

The petitioners' argument (p. 15-26) is consistent with what Judge SIBLEY said in his opinion (V, 475-476; 81 F. Supp. 932). And, as already noted, Judges RUSSELL and BORAH adopted Judge SIBLEY's view, which they said was "well pointed out" (II, 731-733; 201 F. 2d 331-332).

The argument is this:

First: Under Section 77, as enacted in 1933, a "forced merger" was unauthorized.

Second: There were two consistency clauses in the 1933 Act: one in (b) which mentioned "provisions" and one in (e) which mentioned "purposes". They barred a "forced merger".

Third: In 1935 they "became accidentally misplaced in redrafting the Act", as Judge SIBLEY said (V, 475; 81 F. Supp. 932). This accidental misplacement consisted of a transfer and consolidation of the two clauses into the single clause in subsection (f) which we have quoted above.

Fourth: As a result of the accidental misplacement of the consistency clause, Section 77 now reads as if it authorized a "forced merger".

Fifth: Legislative history shows that the Congress did not intend to authorize a "forced merger" and should prevail over the wording of the statute.

The theory about accidental misplacement seems to be an indispensable link in the chain of the argument. It was mentioned by Judge SIBLEY and is stressed by the petitioners (p. 2-3, 25-26).

This Court's decision on March 9, 1953 in *Unexcelled Chemical Corporation* v. *United States* 97 L. Ed. (Adv.) 486 establishes that, if the consistency clause "became

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accidentally misplaced in redrafting the Act of 1935" and as a result means something different from what the Congress intended, the Courts nevertheless have to give it the meaning which it has in its present form and location.

However, the petitioners' argument is plainly unsound for additional reasons. We take up the points in sequence:

First: We agree that the Commission's Plan could not have been carried out under Section 77 in its original 1933 form over the objections of the holder of a majority in amount of the First and Refunding Mortgage Bonds. That is because, before the enactment of the cram-down provision in 1935, anything more than one-third in amount of a class of creditors like the holders of the First and Refunding Mortgage Bonds in this case could block a plan whether it provided for a "merger" or not (47 Stat. 1480).

However, even under the 1933 Act there could have been a "forced merger" in one of the senses in which the petitioners use that undefined term. If the Court determined that the debtor was insolvent, then a "merger" could be "forced" as against the stockholders, although not as against the creditors (*id.*).

Second: The two consistency clauses in the 1933 Act had nothing to do with the legality of a "forced merger", however that is defined. They referred, as does the consistency clause today, to the public interest aspects of a unification (see above, p. 26-29).

Third: There is no basis for a supposition that the consistency clause became accidentally misplaced in redrafting the act.

Fourth: Section 77 clearly authorizes a unification over the objection of the holders of a majority in amount of the First and Refunding Mortgage Bonds.

Fifth: There is no occasion to resort to legislative history. In any event, the legislative history does not support the petitioners' argument (see below, p. 41-44).

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(D) The petitioners' theory would bar unifications within a system or corporate family and defeat an important objective of Section 77.

The theory clearly conflicts with the decision of the Court of Appeals for the Second Circuit in *Old Colony Bondholders* v. *New York, New Haven and Hartford Railroad Co.*

One of the outstanding things about railroad reorganizations under Section 77 of the Bankruptcy Act is the extent to which unifications have been effected within railroad systems through reorganization plans. If the petitioners' theory were sound, many such unifications would have been impossible.

Judge SIBLEY said (V, 479; 81 F. Supp. 933-934):

> "This case is not as though the merging corporations were affiliates, and members of the same corporate family already. In such a case there is really a mere simplification of the corporate organization of interests already related."

The distinction made by Judge SIBLEY is not permissible under the petitioners' theory. If the "provisions and purposes" of the Interstate Commerce Act barred forced mergers, those "provisions and purposes" would bar "forced mergers" of "affiliates" or members of the same "corporate family" or "system". For the Interstate Commerce Act applies to such mergers as well as to mergers of "stranger" railroad corporations.[1]

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[1] Section 5 (2) of the Interstate Commerce Act expressly applies to mergers of corporations "in separate ownership".

Section 5 has consistently been construed to apply to mergers of corporations which are already "affiliates" and members of the same "corporate family" and the same "system". See *Schwabacher* v. *United States* (1948) 334 U. S. 182. The following are some examples of "intra-system" mergers passed upon under Section 5(2) of the Interstate Commerce Act in recent years: *Cleveland, C. C. & St. L. Ry. Co. Merger*, 228 I. C. C. 240 (1938); *Toledo & O. C. Ry. Co. Merger*, 228 I. C. C. 433 (1938); *Elgin, J. & E. Ry. Co. Merger*, 230 I. C. C. 431 (1938); *Atchison, T. & S. F. Ry. Co. Merger*, 254 I. C. C. 159 (1942); *Kansas City S. Ry. Co. Merger*, 254 I. C. C. 529 (1942); *Delaware, L. & W. R. Co. Merger*, 257

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Old Colony Bondholders v. *New York, N. H. & H. R. Co.* (C. C. A. 2, 1947) 161 F. 2d 413, cert. den. *Protective Committee for Bonds of Old Colony Railroad Co.* v. *New York, New Haven & Hartford Railroad Co.* (1947) 331 U. S. 858, rehearing denied (1947) 332 U. S. 803, affords an example of a "forced merger", in the sense in which that term has been used by the petitioners, that was effected by authority of Section 77. By the reorganization all of the assets of Old Colony Railroad Company were transferred to the reorganized New York, New Haven & Hartford Railroad Company despite the adverse vote of a majority in amount (of those voting) of the holders of the mortgage bonds of the Old Colony. As the stock of the Old Colony was held to be without value, the holders of the mortgage bonds were just as much the "equitable owners" of the Old Colony's property as the holders of the First and Refunding Mortgage Bonds can be said to be the "equitable owners" of the properties of the Florida East Coast. The Old Colony decision has a double significance: *first,* it is an example of one type of so-called "forced merger" which the Congress doubtless intended to authorize and, *second,* it establishes not merely that there is no conflict between Circuits but that, on the contrary, the Courts of Appeals in two Circuits have reached the same result.

(E) It is reasonable to assume that the Congress intended to authorize a "merger plan", if compatible with the public interest and fair, even though opposed by a majority in amount of a large class of creditors.

Presumably the petitioners concede that, if the Commission's Plan did not provide for a unification with the

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I. C. C. 91 (1944); *Delaware & H. R. Corp. Merger,* 257 I. C. C. 453 (1944); *Chicago & Northwestern Railway Co. et al Merger,* 261 I. C. C. 672 (1946); *Pere Marquette Railway Co. Merger,* 267 I. C. C. 207 (1947).

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Atlantic Coast Line, the opposition of the majority in amount of the First and Refunding Mortgage Bonds could not defeat the Plan. *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495. In the light of the objectives of the Section 77 proceeding there is no valid reason for a distinction, so far as opposition is concerned, between an "internal plan" and a "merger plan".

The policy of the Congress has been to favor unifications, commonly called "consolidations". *Schwabacher* v. *United States* (1948) 334 U. S. 182, 191-197. The objective has been to bring about the "union of the weak with the strong". *Nickel Plate Unification* (1926) 105 I. C. C. 425, 449. That policy is now expressed by the provisions of Section 5(2)(c) and 5(2)(d), which will be found in Appendix A (p. vi-vii) and under which, if there be an application for authority to bring about a unification of two or more railroads in a territory, the Commission, on the petition of another railroad or railroads in the territory, can require that such other railroad or railroads be included in the unification.

Congress must be presumed to have known that in some cases nothing could be more sensible, from the point of view of the public interest, than the union of a bankrupt railroad and a strong trunk line. The unification of the Alton and the Gulf, Mobile & Ohio, already mentioned, is an example. This case is another.

Nor is there any reason to suppose that the Congress intended to have the disposition of the property of the debtor in a Section 77 proceeding virtually determined by the ambitions or wishes of a holder or holders of a majority in amount of a class of creditors, however large or important, if more favorable treatment could be obtained for that class of creditors *as a class* by a so-called merger plan which would also serve the public interest. An estate in bankruptcy is in a real sense a trust estate and, of course,

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the general rule governing the administration of a trust estate is that property of the estate may not be disposed of to *some* of the beneficiaries for less than its fair value. *Restatement, Trusts,* § 190 (1). If a majority in amount could block a transfer of the Debtor's property to the Atlantic Coast Line or any other existing railroad corporation, and could compel a transfer on less favorable terms to a new corporation which the majority itself would control, there would be, in substance, a sale of the trust property to some of the beneficiaries at the expense of the others.

(F) If the language of the statute were not plain and unambiguous, the Commission's construction would be entitled to great weight.

We have noted above (p. 12-13) that the majority of the Commission expressly rejected the arguments which the petitioners now advance (267 I. C. C. 730-732) and that no member of the Commission has ever expressed agreement with those arguments.

This would be significant if the statute were not plain and unambiguous. *United States* v. *American Trucking Associations, Inc.* (1940) 310 U. S. 534, 549; *Medo Photo Supply Corp.* v. *National Labor Relations Board* (1944) 321 U. S. 678, 681 footnote; *National Labor Relations Board* v. *Hearst Publications, Inc.* (1944) 322 U. S. 111, 130-131; *Skidmore* v. *Swift & Co.* (1944) 323 U. S. 134; *Boutell* v. *Walling* (1946) 327 U. S. 463, 470-471.

(G) The language of the statute being plain and unambiguous, there is no occasion for recourse to the legislative history.

The legislative history on which the petitioners rely would not afford any substantial support to their theory even if Section 77 were ambiguous.

This Court's most recent rulings have been explicit that resort should not be had to legislative history when the meaning of a statute is clear. *Ex parte Collett* (1949) 337

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U. S. 55, 61; *Unexcelled Chemical Corporation* v. *United States* (1953) 97 L. Ed. (Adv.) 486, 489-490.

Moreover, despite the eminence of the Judges and counsel who have relied on legislative history as establishing that the Commission could not approve the Plan in this case in the face of the objection of the holders of a majority in amount of the First and Refunding Mortgage Bonds, we feel constrained to say that arguments based upon legislative history seem very frail indeed.

Of course, in this as in any other historical study it is important to distinguish between the *source material* and the *historians' comments.*

The source material quoted in the petitioners' brief (p. 15-26) consists of statements made by Commissioner Eastman; by Mr. Leslie Craven, who was Counsel for Commissioner Eastman as Federal Coordinator in 1935; and by members of the Congress. We defer for consideration later (p. 48-49) the source material relating to the cram-down provision which will be found at pages 27-28 of the petitioners' brief.

Interpolated between the items of source material in the petitioners' brief are the historians' comments.

No one who read the source material by itself without the historians' comments would suppose that it had any significant bearing on any question in this case. In other words, the legislative history argument does not really rest upon what was said by Commissioner Eastman, Mr. Craven and the members of the Congress, but rather upon what petitioners' counsel infer they meant by what they said.

The argument starts with a quotation from a letter written by Commissioner Eastman to Senator Hastings on January 1, 1933 about a draft of what later became a part of Section 77 (p. 19-20). The meaningful part of this source material reads as follows (italics supplied):

> "*Explanation.*—This act ought not to authorize railroad mergers or consolidations or the transfer

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> of railroad properties or the issuance of railroad securities *which are inconsistent with the applicable provisions of the Interstate Commerce Act, particularly the consolidation plan provisions.* These amendments are intended to avoid that possibility."

Obviously, the reference here was to the consolidation plan provisions of the Interstate Commerce Act which were described in the *Schwabacher* opinion (334 U. S. 191-192). In other words, the subject was the *public interest aspects* of a unification. After quoting the Explanation, the petitioners' brief says (p. 20):

> "Eastman's suggestion was adopted. His proposal was for the very purpose of providing that mergers in reorganizations in bankruptcies had to be made pursuant to the provisions of the Interstate Commerce Act which required consent of the carriers."

We submit that the source material affords no support for this statement.

After various comments the brief then quotes statements made on the floor of Congress in 1933 (p. 21-22). These statements also referred to the *public interest aspects* of a reorganization.[1]

Skipping ahead to 1939, the brief next quotes a statement by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, which was made when proposed amendments of the Interstate Commerce Act were under consideration (p. 22-23). It is clear that when Senator Wheeler spoke of "a bill to force consolidations" he had in mind a bill to carry out a general program for the consolidation of solvent railroads i.e. an amendment of the consolidation plan provisions then in effect which would have authorized the Commission to force

[1] Congressional Record, Vol. 76, Part 3, p. 2902-2931, especially p. 2909 and 2917-2918; Part 5, p. 5112.

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through any consolidations of solvent corporations which it thought in the public interest.

Going back to January, 1935, the petitioners next quote a statement in a Report by Commissioner Eastman as Federal Coordinator of Transportation (p. 23). The historians' comment reads (p. 24):

> "This report is significant on two points. One, it recognizes that the existing (1933) statutes did not authorize forced mergers; and, two, that 'these changes (statutory) to allow it will not now be recommended' (p. 43)."

Commissioner Eastman's Report contained two separate sections, one dealing with railroad reorganizations (p. 35-40) and another dealing with consolidations and unifications (p. 40-56). The petitioners' quotation is from the second section. It is clear that it referred to an amendment of the Interstate Commerce Act so as to provide for a general program for the consolidation of railroads providing for compulsion operative against solvent railroads.

The next item of source material is the statement made by Mr. Craven during the Committee hearings at the time of the 1935 revision of Section 77 (p. 24-25). The purpose of quoting Mr. Craven seems to be to show that the change in the location or makeup of the consistency clause was not meant to change the effect of the clause (p. 25-26). We have already commented about the contention that the consistency clause was "accidentally misplaced" in 1935 (see above, pages 36-37).

(H) If the petitioners wished to maintain that what they call a "forced merger" is illegal, they could have asked this court to decide the matter when the Atlantic Coast Line petitioned for certiorari in 1950.

Referring to the Atlantic Coast Line's petition for certiorari in April, 1950, the petitioners say (p. 12):

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> "The questions of power raised by the present petition were not raised by that petition and could not have been raised by the present petitioners at that stage since they had prevailed in the Court below."

We submit that this is incorrect. The petitioners could have raised "the questions of power" in 1950 and we think that they should have done so if they intended to rely on the proposition that a "forced merged" is illegal.

Section 1254(1) refers to "any party". We do not understand that this Court has ever decided that a successful party cannot file a petition for certiorari. Compare *United States* v. *Bankers Trust Co.* (1935) 294 U. S. 240, 243; *United States* v. *United Mine Workers of America* (1947) 330 U. S. 258, 269.

In any event, the petitioners were by no means wholly successful in 1950 (see above, p. 17-18). The Court of Appeals remanded the Plan to the Commission (179 F. 2d 544):

> "• • • for the purpose of working out a really fair and equitable plan and without prejudice in doing so to the due consideration of any fair and equitable plan for bringing this matter to an end, including such a plan providing for a merger with, or sale to, the Coast Line either with or without the approval of the security holders."

As a result, at least until the case again came before the Court of Appeals more than two years later, it was the law of the case that a so-called "forced merger" was lawful. Then, of course, the Court of Appeals reaffirmed the law of the case as established by it in 1950.

Whether or not the appellees had a standing to file a cross-petition for certiorari in 1950, they certainly could have consented to the granting of certiorari and informed this Court that they proposed to raise "the questions of power" which are raised by the present petition. If this Court had then granted certiorari they could have raised

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the questions of power, because it would have been open to them to sustain the disapproval of the Previous Plan on any ground, whether that ground was adopted by the Court of Appeals or not. *Lagnes* v. *Green* (1931) 282 U. S. 531, 536-537; *Walling* v. *General Industries Co.* (1947) 330 U. S. 545, 547, note 5.

Instead they allowed the case to be remanded to the Commission. Then when it reached the District Court again almost two years after this Court had denied certiorari, they bewailed the allegedly excessive delay in consummating a reorganization and Judge STRUM dismissed the proceeding because of undue delay (I, 165-169; 103 F. Supp. 846-847). Now, almost three years after St. Joe-duPont and Conn opposed the granting of certiorari in 1950, they ask the Court to issue a writ.

The point which the petitioners seek to raise is quite personal to St. Joe-duPont. It is they who have the majority of the First and Refunding Mortgage Bonds. If they ceased to oppose the Plan, there would be no opposing majority and consequently there could be no argument that the opposition of a majority was fatal to a unification plan. St. Joe-duPont took the lead in inducing Judge STRUM to find that there was undue delay. Yet, having tried to keep the case from going to this Court in 1950, they try to get it there now.

II.

THERE IS NO SUBSTANTIAL QUESTION ABOUT THE CRAM-DOWN PROVISION OF SECTION 77 AND RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The petitioners' second question involves the "cram-down" provision of Section 77 and Rule 52(a) of the Federal Rules of Civil Procedure. Their contention is that under Rule 52(a) the Court of Appeals could not reverse Judge STRUM unless his "findings" were "clearly erroneous" and that they were not.

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(A) There is no unsettled question of law as to the meaning of the cram-down provision or as to the respective functions of the Commission and the Courts in Section 77 reorganizations.

This Court defined the respective functions of the Commission and the Courts in connection with the approval of a plan of reorganization in *Ecker* v. *Western Pacific Railroad Corp.* (1943) 318 U. S. 448 and *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* (1943) 318 U. S. 523. Then in *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1946) 328 U. S. 495 the Court summarized its holdings in the *Western Pacific* and *Milwaukee* cases (p. 509):

> "To the courts, Congress confided the power to review the plan to determine whether the Commission has followed the statutory mandates of subsection (e), 318 U. S. at 477, and whether the Commission had material evidence to support its conclusions. 318 U. S. at 477; concurring opinion at 512."

The *Denver & Rio Grande* opinion just cited enunciated the law with respect to confirmation. The Court said (p. 534):

> "If there is a rejection, there is a reexamination of the plan to assure that those who dissent have had fair and equitable treatment. Apparently the reexamination for this treatment does not differ from that for the original court approval under the first paragraph of subsection (e). It does, however, center upon the rights of those who rejected the plan."

The Court also suggested that changed conditions might justify a rejection of a plan (p. 533). Since the *Denver & Rio Grande* case was decided, the Congress has extended the power of the Commission to deal with changed condi-

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tions. 11 U. S. C. § 208. However, it is unnecessary to consider whether any enlargement if the Commission's power to deal with changed conditions has affected the Court's functions with respect thereto, because Judge STRUM made no finding that there was any change in conditions between the approval of the Plan by the Commission on October 25, 1951 and the hearing before Judge STRUM in February, 1952.

Chief Judge HUTCHESON's opinion below cited (II, 729; 201 F. 2d 330, note 8) *Securities and Exchange Commission* v. *Central-Illinois Securities Corp.* (1949) 338 U. S. 96. While the *Central-Illinois* case involved Section 11(e) of the Public Utility Holding Company Act of 1935, this Court's opinion referred at length (p. 114, 119-123, 125-126) to Section 77 and the respective functions of the Interstate Commerce Commission and the Courts thereunder. In determining the effect of valuation findings of the Securities and Exchange Commission the Court said (p. 126):

> "Administrative finality is not, of course, applicable only to agency findings of 'fact' in the narrow, literal sense. The Commission's findings as to valuation, which are based upon judgment and prediction, as well as upon 'facts,' like the valuation findings of the Interstate Commerce Commission in reorganizations under § 77 of the Bankruptcy Act, *Ecker* v. *Western Pacific R. Corp., supra,* are not subject to reexamination by the court unless they are not supported by substantial evidence or were not arrived at 'in accordance with legal standards.' "

(B) The statement made by Commissioner Eastman in January, 1935, which the petitioners quote, has no significance.

The petitioners quote (p. 27-28) a statement in a Report by Commissioner Eastman, Coordinator of Transportation, issued in January, 1935.

Mr. Eastman's Report, which was dated January 21, 1935, did not discuss the provisions of Section 77 as it was

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revised on August 3, 1935. The Report discussed a draft revision which was materially different from the revision adopted by the Congress.[1]

When the *Denver & Rio Grande* case (328 U. S. 495) was before this Court, counsel for City Bank Farmers Trust Company, Trustee of the General Mortgage, in their brief (p. 60-68) challenged the application of the "cram-down" provision to the General Mortgage Bonds, and quoted the full text of what is now quoted in the petitioners' brief (*id.*, Appendix, p. 13-14). When this Court construed the cram-down provisions, it did not give Commissioner Eastman's statement the effect which the petitioners seek to give it.

Commissioner Eastman's statement was that *"if the court shall find that the plan is fair and equitable, it may make it effective, even if not so approved"*, but that

> "Arbitrary compulsion of plans over the dissents of the interested classes is not intended, nor is it believed that the courts will override strong dissents by any large number of such classes, or by a single large class, excepting where it is established that they have no interest in the property."

The petitioners italicize Commissioner Eastman's reference to "strong dissents by any large number of such classes"; we are not concerned here with dissents by a number of classes. Commissioner Eastman also referred to a dissent "by a single large class". As to that, it is enough to say that the General Mortgage Bonds of the Denver & Rio Grande were a large class; the claims thereon totaled $43,548,155 (328 U. S. p. 503). And the holders of the Convertible Bonds of the Rock Island, referred to under the next subheading, were also a large class.

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[1] H. R. Doc. 89, 74th Cong. 1st Sess. (1935), 101, 105, 238.

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(C) The petitioners' point involves the distribution of power in a Section 77 reorganization among the Commission, the District Court and the Court of Appeals.

The same basic questions were decided by the Circuit Court of Appeals for the Seventh Circuit in the Rock Island reorganization.

It is well recognized that "the development, approval, confirmation, and consummation of a plan of reorganization are not mere steps of an ordinary law suit". *In re Chicago, R. I. & P. Ry. Co.* (C. C. A. 7, 1947) 160 F. 2d 942, 945; cert. den. *Chase National Bank, Trustee* v. *Cheston* (1947) 332 U. S. 793; rehearing denied (1947) 332 U. S. 826.

In the present case the Commission approved a plan of reorganization by a vote of seven to three. If the petitioners' point were valid, it would apply even if the Commission's vote had been unanimous.

This case then went to the District Court, which disapproved the Plan and dismissed the proceeding with the idea of putting through another plan in equity.

The Court of Appeals held that the Commission was right and the District Court was wrong. While there was a division within the Court, none of the Judges of the Court of Appeals expressed approval of the District Court's opinion, and, if the petitioners' point were valid, it would be good even if the Court of Appeals had been unanimous.

Basically what the petitioners contend is that the Judge holding the District Court should be dominant—that he should have the leadership which this Court said in the *Western Pacific* case has been confided in the Commission (318 U. S. 468).

In re Chicago, R. I. & P. Ry. Co., just cited, and the companion case of *In re Chicago, R. I. & P. Ry. Co.* (C. C. A. 7, 1947) 160 F. 2d 949 involved essentially the same proposition, relating to the distribution of power among the Commission, the District Court and the Court of Appeals in a Section 77 reorganization. In that case an approved plan

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was rejected by two of the classes of creditors, one a small class and the other (the Convertible Bonds) a class with claims which totaled $47,697,440 as of January 1, 1944.[1] The District Judge in charge of the case refused to confirm the plan and, in addition, "entered an order which in substance approved a new plan for the partial reorganization of the debtor and authorized the initial steps toward the consummation of the new plan" (160 F. 2d 950). In other words, the District Judge took charge. The Circuit Court of Appeals reversed both orders and directed that the plan be confirmed.

(D) It is unnecessary to consider the application of Rule 52(a).

The sentence of Rule 52(a) on which the petitioners rely reads:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In view of the limited function of the District Court in connection with the approval of a Section 77 plan, it may be doubted whether Rule 52(a) applies at all.

At most it applies only where the District Court has made new "findings of fact" which were within its province. The petitioners do not, and we think they cannot, cite a single finding, that can properly be called a "finding of fact", which the District Judge made and which it was the Judge's province to make.

Furthermore, the Court of Appeals rightly held (II, 729-730; 201 F. 2d 330):

> "* * * that the findings of the trial judge, rejecting the commission's findings as to the public interest

[1] See *Chicago, R. I. & P. Ry. Co.* v. *Fleming* (C. C. A. 7, 1946) 157 F. 2d 241, 247.

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> and as to valuation, and declaring that the plan is unfair and inequitable, are themselves without support in law or in fact;"

Surely this was tantamount to a holding that the District Court's findings were "clearly erroneous".

(E) The District Court's findings were "without support in law or in fact."

The transcript of the hearings and arguments before the Interstate Commerce Commission comprises 7,750 pages and there are 489 exhibits; these and the various petitions and other documents filed with the Commission are the unprinted record which was before the Court of Appeals and is now before this Court. In addition, of course, Judge STRUM had before him most of what is now contained in the six Volumes of the printed record. He wrote a long opinion containing a great many statements with respect to matters of fact and law.

The briefs in the Court of Appeals totalled over 600 pages, divided about evenly between the two sides. Extra time was allowed for the argument.

It is against this background that the Court should consider the petitioners' statement that Chief Judge HUTCHESON's opinion in the Court of Appeals contains "no real attempt to deal with the evidence" (p. 29) and Judge HUTCHESON's statement (II, 729; 201 F. 2d 330):

> "It will, therefore, serve no useful purpose for us to take up one by one, as the appellants and appellees have done, to dissect and discuss them, the findings made and reasons given by the commission, on the one hand, and those set out in the lengthy opinion of the trial judge, on the other, to determine our agreement or disagreement with each of them in turn."

The majority of the Court held, in terms already quoted, that Judge STRUM's findings were "themselves without

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support in law or in fact". The minority did not express any disagreement as to that (II, 731-733; 201 F. 2d 331-332).

It is obviously impossible for us to refer to everything said in Judge STRUM's opinion which could on any theory be called a "finding," but we will refer briefly to the principal findings in which the various petitioners are interested and show that they are utterly without support.

The Forecast of the Normal Earnings of the Florida East Coast.

After a thorough and expert review of a full record the Commission found "that the Debtor's income available for fixed charges and Federal income taxes may reasonably be expected to amount to $2,300,000 in a future normal year" (282 I. C. C. 99-112).

The record included forecasts made by parties which can be compared with the Commission's forecast:

Forecasts by Parties

Debtors' Trustees	$1,879,000
Atlantic Coast Line	2,150,000
St. Joe Paper Company	2,250,000–2,500,000
Lynch Interests	2,855,000
The Commission's Forecast	$2,300,000

Judge STRUM thought the Commission's forecast of $2,300,000 "too low" (I, 149; 103 F. Supp. 838) and he found (I, 146, 156; 103 F. Supp. 837, 841-842):

> "• • • the Court finds that a plan based upon a capitalization of $2,300,000 as normal available income is entirely inconsistent with the actual proven experience of the road, and unsupported by substantial evidence.
>
> • • • • •
>
> "Thus, the bondholders take all the chances of the accuracy of the Commission's predictions, as the prospects of the earnings falling below $2,300,000 is, under the evidence, too remote for serious consideration."

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The Commission's forecast, which Judge STRUM found "too low" and "unsupported by substantial evidence", was $421,000 greater than the forecast, based on careful and thorough testimony and exhibits, which was made by the Debtor's Trustees, the Court's own appointees (282 I. C. C. 101-102).

There is no occasion for surprise that the Court of Appeals concluded that Judge STRUM's findings on this subject were without support.

The Forecast of the Normal Earnings of the Atlantic Coast Line.

After a similarly careful review of the record the Commission found "that the annual prospective earnings of the Coast Line for Federal income taxes and interest are approximately $12,600,000" (282 I. C. C. 148).

As was pointed out before Judge STRUM, *the important thing was the relationship of the two forecasts:* $2,300,000 for Florida East Coast and $12,600,000 for the Atlantic Coast Line. If both were pessimistic or optimistic to approximately the same extent, the Florida East Coast bondholders could not be hurt: they could be hurt only if the forecast of the Florida East Coast's earnings were *relatively* pessimistic or if the forecast of the Atlantic Coast Line's earnings were *relatively* optimistic. The reason for this is that the 90,000 shares of new Participating Convertible Preferred Stock and 60,000 shares of Common Stock allotted to the Florida East Coast creditors will represent over 15% of the equity in the unified enterprise (267 I. C. C. 736). The crucial importance of the relationship of the two forecasts was recognized by the Court of Appeals which said (II, 728; 201 F. 2d 329-330):

> "* * * beyond any peradventure * * * the Commission's findings and estimates of the respective future earnings of East Coast and Coast Line * * * were most favorable to the bondholders of East Coast."

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Before Judge STRUM in February, 1952, the Atlantic Coast Line introduced comprehensive testimony and exhibits which showed that the Atlantic Coast Line's earnings in 1951 had exceeded the Commission's forecast *relatively* much more than the Florida East Coast's earnings (II, 549-561, 622-628, 632-641; A. C. L. Ex. Nos. 1, 2, 3, 5, 9, Vol. III). Such evidence and exhibits were among the bases for the findings of the Court of Appeals.

Judge STRUM simply made no reference whatever to the earnings of the Atlantic Coast Line—as forecast or as realized.

It cannot be said that that is irrelevant to the question whether Judge STRUM's findings were of "themselves without support". His complete disregard of the record with respect to Atlantic Coast Line's earnings left his ultimate finding, that the Plan was unfair, without support.

The Fair Market Values of the Securities.

At the hearing on the objections to the Plan, Judge STRUM evinced great interest in the prospective market values of the securities which would be issued under the Commission's Plan, under the plan which the St. Joe Paper Company had proposed before the Commission in 1950 and under the alternative equity plan referred to above at pages 20-23 (II, 269-271).

The Commission had been asked to make findings as to the "fair market values" of the securities which would be issued under (1) the Plan which it approved, (2) the St. Joe Paper Company's 1950 plan and (3) the plan for an internal reorganization having the kind of capital structure which the Commission would be willing to approve if there were an internal plan (such plan has been referred to as the "Commission's hypothetical internal plan"). The Commission made findings as follows (282 I. C. C. 157-158, 162-163) as to the market value of the cash and securities which would be distributable to the creditors of the Florida

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East Coast under the three plans (exclusive of any cash distributable from the estate):

The Commission's Plan	$38,380,000
St. Joe Paper Company Plan	26,250,000
Commission's Hypothetical Internal Plan	24,050,000

Of course, the principal reason why the Commission's Plan provided for so much more than either internal plan is because very large economies would result from the unification (282 I. C. C. 135-140). And the assurance of such economies from a unification is the reason why an internal plan cannot compete with a unification plan if there is equality of treatment under the internal plan.

Because the alternative equity plan was not developed until after the Commission had certified its Plan to the Court, there were, of course, no findings of the Commission with respect to the alternative equity plan. But an expert for the Deposit Committee made a thorough and careful comparison of the Commission's Plan and the alternative equity plan and concluded that the Commission's Plan provided more than the alternative equity plan provided even for those who would be the beneficiaries of the unequal treatment under the alternative equity plan (II, 564-616; Deposit Committee's Ex. Nos. 1-8, Vol. III).

Despite the interest which Judge STRUM had evinced in the subject of prospective market values and fair market values, none of the opponents of the Commission's Plan offered any evidence on the subject.

When Judge STRUM came to write his opinion he made no reference whatever to the Commission's findings on this subject or to the evidence of the Deposit Committee's expert. On the other hand, after saying that the Plan was "intrinsically unfair and inequitable" he said (italics supplied; I, 142; 103 F. Supp. 835):

> "This is so even though the new securities in the other railroad may have an *ostensible value* equal

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to that of the present securities of the debtor railroad."

Furthermore, he referred four times to the Atlantic Coast Line securities as "of fluctuating or debatable value" or "of debatable value" as if they were unacceptable on that account (I, 142, 142, 143, 151; 103 F. Supp. 835, 835, 835, 839).

The holding of the Court of Appeals with respect to the Commission's findings and estimates "of present and future values of the securities to be given in exchange for each other" was the same as that which we have quoted in connection with the estimates of the future earnings (II, 728; 201 F. 2d 329-330).

The effect of the Plan on the Employees—The Railway Labor Executives' Association.

It has long been recognized that a prospect of economies through unified operations argues in favor of a unification. *Texas* v. *United States* (1934) 292 U. S. 522, 530-531. At the same time, Section 5(2) of the Interstate Commerce Act directs the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected" (Appendix A, p. vii), and even without the consistency clause the Commission would be authorized to impose conditions for the protection of the interests of the employees because a plan must be in the "public interest". *United States* v. *Lowden* (1939) 308 U. S. 225.

The provision to be made for the employees was considered by the Commission in both the Third Supplemental Report (267 I. C. C. 325-327) and the Fifth Supplemental Report (282 I. C. C. 134-135).

The protection for the employees under the Commission's Plan is as broad as, if not broader than, any that has ever been provided in connection with a unification of two railroads. It includes (282 I. C. C. 134-135):

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All the protection which employees have customarily had under Section 5(2)(f) of the Interstate Commerce Act, the applicable statute;

All the protection afforded by the Washington Job Protection Agreement, the agreement between the railroads and the employee organizations which governs generally the protection of the interests of employees in cases of unifications; and

In addition, an agreement by the Coast Line that "to the extent that it considers practicable, the Coast Line would undertake to see to it that the unification would not result in the dismissal of employees of the debtor after the 4-year protection period provided in section III of its proposed revised plan, but it would reserve the right to dismiss employees of the Florida East Coast after the expiration of the 4-year period".

Section III of the Plan reads (282 I. C. C. 213):

> "The authorization hereafter to be granted upon confirmation of the plan for the acquisition by the Atlantic Coast Line Railroad Company of the properties of the debtor shall be upon condition that during the period of 4 years from the date the properties of the debtor become vested in the Atlantic Coast Line Railroad Company such transaction will not result in employees of the carrier or carriers by railroad affected by such acquisition being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to such condition shall not be required to continue for a longer period, following the date of such acquisition, than the period during which such employee was in the employ of such carrier or carriers prior to the date of such acquisition, provided, however, that nothing in such condition shall bar the Atlantic Coast Line Railroad Company and authorized representatives of employees of the carriers from entering into agreements for the protection of the interests of the employees."

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The District Judge stated his conclusion as follows (I, 161-162; 103 F. Supp. 844):

> "The Commission finds that unification of F.E.C. with A.C.L. would result in annual operating savings of $925,000. It has already been shown that this will be effected largely through the discharge of 319 employees. These prospective savings do not of themselves justify the consequences of the merger upon the employees, nor upon the property interests of the 5% bondholders."

It was *not* shown that the savings of $925,000 a year would "be effected largely through the discharge of 319 employees". Comprehensive and undisputed evidence established that the elimination of 319 *positions* would be brought about principally, if not entirely, by deaths, retirements and resignations in the ordinary course[1] (cf. 282 I. C. C. 136).

Proceeding on an erroneous factual premise, the Judge weighed "the consequences of the merger upon the employees" against the advantages of strengthening the national transportation system through operating economies. Quite aside from the erroneous factual premise, the matter was for the Commission, not for the Court.

Here again Judge STRUM's finding was clearly "without support in law or in fact".

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[1] This evidence was contained in turn-over studies and testimony explaining them. The following table lists the numbers of the Exhibits comprising the turn-over studies and the pages of the transcript of the record before the Interstate Commerce Commission in which the various studies were explained.

Ex. No.	*Pages of Transcript*
391	5678-5679, 5694-5700
394	5678-5679, 5701-5702, 5954
403	5678-5679, 5919-5925

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The Southern and the Seaboard—the Jacksonville Gateway.

The Florida East Coast runs from Florida City, south of Miami, to Jacksonville. The Seaboard Air Line runs from Miami to West Palm Beach, alongside of the Florida East Coast, and then reaches Jacksonville by a route nearer the center of the State of Florida. The Atlantic Coast Line owns lines in central and western Florida but none along the east coast. The Southern Railway Company owns no lines in Florida at all, using Atlantic Coast Line tracks to reach Jacksonville; it solicits traffic to and from the Atlantic Coast Line's lines in central and western Florida as well as to and from the lines of the Florida East Coast.[1]

The Atlantic Coast Line, the Seaboard and the Southern all connect with the Florida East Coast at Jacksonville and the point of connection is known as the "Jacksonville gateway".

Each of the three trunk lines now solicits interline shipments moving from or to the Florida East Coast via the soliciting trunk line.

Section IV of the Plan provides (282 I. C. C. 213):

> "All existing through routes via Jacksonville, Fla., to and from points now served by the debtor in connection with Seaboard Air Line Railroad Company and Southern Railway system shall be kept open."

The same provision was in the Previous Plan (267 I. C. C. 748). It means that after the consummation of the Plan the Southern and Seaboard will still be able to solicit traffic to and from the lines now operated by the Florida East Coast.

The effect on the Southern and the Seaboard of a unification of the Florida East Coast and Atlantic Coast Line

[1] Georgia, Southern & Florida, a Southern Railway System line, has a limited amount of mileage in the northern part of the State.

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—and the effect on the Jacksonville gateway—were discussed in the Commission's Third Supplemental Report in 1947 (267 I. C. C. p. 335-339) and in the Fifth Supplemental Report dated July 12, 1951 (282 I. C. C. p. 140-142).

Among other things, the Commission pointed out (267 I. C. C. p. 336):

> "If the debtor should be merged with the Coast Line, the situation of the Southern as to the east coast of Florida would be the same as it has been for many years as to the central section and the west coast of Florida."

When Judge STRUM took up these matters in his opinion he proceeded without any regard to what the Commission had said. We will not undertake to point out all of the errors in the Judge's discussion. The heart of it will be found in these two sentences (I, 163; 103 F. Supp. 845):

> "[The addition of the Florida East Coast to the A. C. L. system] would effectively close the 'open gateway', which now exists at Jacksonville, and give A. C. L. a virtual monopoly over the interchange business at Jacksonville. Apparently the Commission saw no 'grave consequences' for the public in this situation."

There was no support for the Judge's statement that the unification of the Florida East Coast and the Atlantic Coast Line would close the Jacksonville gateway and "give A. C. L. a virtual monopoly over the interchange business at Jacksonville". Consequently, the assertion that the Commission saw no "grave consequences" from the closing of the gateway and the granting of such a monopoly was plainly unwarranted and unfair to the Commission.

Judge STRUM did not merely reach a conclusion which differed from that of the Commission on a subject which was peculiarly within the Commission's province. He went much further than either the Southern or the Sea-

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board had ever contended. They had not said that a unification "would effectively close the 'open gateway'." The two trunk lines contended only that they would be hurt financially by the proposed unification, not that the "open gateway" would be closed (282 I. C. C. 141).

CONCLUSION.

The petition should be denied.

Dated, April 6, 1953

EDWARD W. BOURNE
ANDREW OLIVER
WILLIAM A. BOYLAN
120 Broadway
New York 5, N. Y.

CHARLES COOK HOWELL
RICHARD B. GWATHMEY
Wilmington, North Carolina

CHARLES COOK HOWELL, JR.
Atlantic National Bank Bldg.
Jacksonville, Florida

Attorneys for Atlantic Coast Line Railroad Company, Respondent.

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THE STATUTES

Attributes of a Plan of Reorganization.

SECTION 77(b)—first paragraph in full.[1]

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include *the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations,* the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not

[1] The text of all Section 77 provisions is taken from 11 U. S. C. A. § 205. Italics are supplied.

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less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; *and may include any other appropriate provisions not inconsistent with this section.*

Approval of a Plan by the Commission.

SECTION 77(d)—first paragraph in part.

• • • the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

Approval of a Plan by the Court.

SECTION 77(e)—first paragraph and first sentence of second paragraph.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties

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in interest of the time within which such parties may file with the court their objection to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed as far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor,

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and he shall enter an order in which he may either dismiss the proceedings or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received.

Confirmation of a Plan—the "Cram-down" Provision.

SECTION 77(e)—third paragraph in part.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interest or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):* * * *.

The So-Called "Consistency Clause".

SECTION 77(f)—fifth sentence

Upon confirmation of a plan, the Commission shall, without further proceedings, grant authority for the issue of

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any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and *not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.*

The Interstate Commerce Act—Pertinent Provisions.[1]

UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

(2) (a) *It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision* (*b*)—

(i) *for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier,* or two or more carriers jointly, *to purchase,* lease, or contract to operate *the properties,* or any part thereof, *of another;* or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) *Whenever a transaction is proposed under subparagraph* (*a*), *the carrier* or carriers or person *seeking*

[1] The text is taken from 49 U. S. C. A. § 5. Italics are supplied.

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authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e)), *and shall afford reasonable opportunity for interested parties to be heard.* If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1)

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the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commisson that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order

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such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

• • • • •

CONTROL EFFECTED BY OTHER THAN PRESCRIBED METHODS

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

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PLENARY NATURE OF AUTHORITY UNDER SECTION

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modication of its powers under its corporate charter or under the laws of any State.

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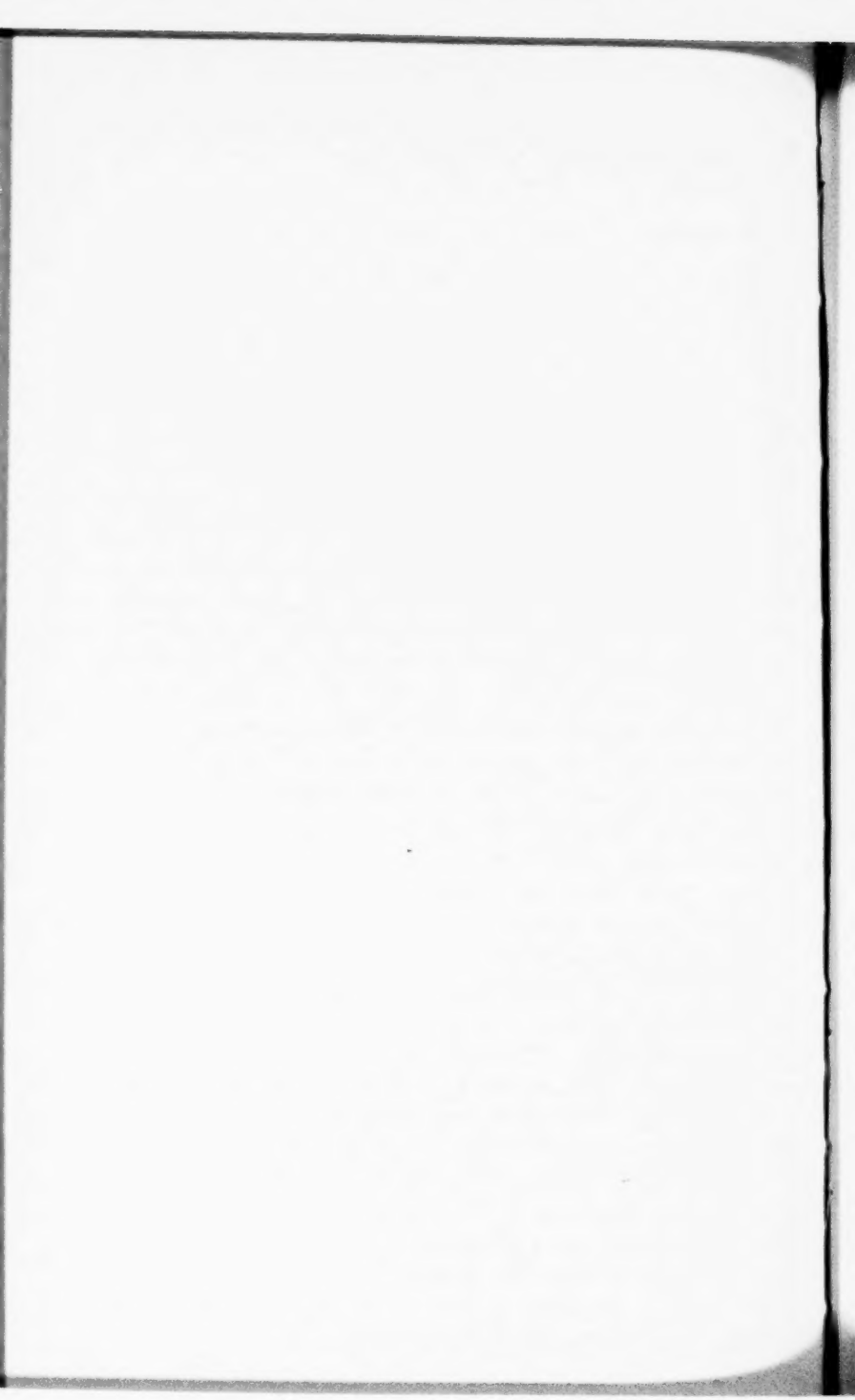

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Appendix B

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THE OPPOSITION TO THE PLAN.

We refer herein to the opposition to the Plan on the part of those listed in the table on page 11 of this brief and also the opposition of the Successor Trustees of the First and Refunding Mortgage.

The Alfred I. duPont Trust and the St. Joe Paper Company.

The Trust which we call the duPont Trust was created by the will of Alfred I. duPont. There are four Trustees: Edward Ball, Mr. duPont's brother-in-law; Jessie Ball duPont, Mr. duPont's widow; Elbert Dent, his son-in-law; and the Florida National Bank of Jacksonville, which is controlled by the Trust (267 I. C. C. 313). The Commission referred to Edward Ball as "the spokesman and active negotiator, if not the dominating influence in this reorganization proceeding" (p. 313).

The duPont Trust is predominantly a charitable trust for the benefit of "crippled children, not incurable, and the care of old men and women, *first consideration to be given to residents of Delaware*" (p. 314, italics supplied). The Trust is wholly charitable except that Mr. duPont's widow has a life interest and his will provided for certain annuities (*id.*).

The Trust is a very large one. As of December 31, 1944 its inventory value was $49,948,142 (p. 314); the actual value was $70,000,000 or more.[1]

The duPont Trust holds 76½ percent of the stock of the St. Joe Paper Company, which operates a paper mill at Port St. Joe and has many other interests (p. 314-315).

The duPont Trust and the St. Joe Paper Company, taken together, own or control in Florida, in addition to

[1] For detail see parts of record cited at p. 50-53 of the A.C.L. Brief of February 14, 1946 included in Item 11 of the A.C.L. Designation (I, 184).

more than $25,000,000 principal amount of the Debtor's First and Refunding Mortgage Bonds, the Florida National Group of Banks; vast amounts of real estate, partly improved and partly unimproved; a telephone and telegraph company operating in and around Port St. Joe; Apalachicola Northern Railroad Company; Union Terminal Warehouse Company at Jacksonville; and other properties (p. 313-315, 344-347).

It can be taken as established that the duPont Trustees and the St. Joe Paper Company bought First and Refunding Mortgage Bonds with the view to controlling the Debtor as reorganized. On the prior appeal Chief Judge HUTCHESON said (179 F. 2d 544):

> "The trial judge, while using language broader than the precise determination before him required, recognized that this was so, in holding that the fact found by the commission, that St. Joe bought the bonds it holds with the desire and purpose to use them to own, control, and run the debtor railroad, and that the plan for merger with the Coast Line would frustrate that desire and purpose, was not a reason for refusing to approve the plan."

The Chief Judge quoted this, with italics for emphasis, in his opinion of January 19, 1953 (footnote 5 at II, 721 and at 201 F. 2d 327).

The Lynch Interests, who now oppose the Commission's Plan and support the alternative plan, previously opposed vigorously an internal reorganization with duPont-St. Joe control. In the brief which they filed with the Commission dated February 15, 1946 after the long hearings in Washington and West Palm Beach, Florida, in November, 1945, they said (p. 69):[1]

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[1] This brief is part of the unprinted portion of the record (I, 184).

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"Throughout this proceeding, the position of St. Joe Paper Company has been one of expediency based on the amount of bonds owned at any given time in relation to its ultimate goal of control of the reorganized company. Its proposals for a capital structure, for the character of the securities to be issued and for the treatment of the Refunding bondholders have vacillated from time to time, not in relation to earning forecasts and similar standards but in relation to what was expedient to assure control for St. Joe Paper Company. That approach has been uniform and continues at present."

* * * * *

"As already pointed out, St. Joe Paper Company is, in effect, an instrument of the du Pont estate, which has many substantial interests in the State of Florida, occupying a major place in the financial and economic life of the State.

"The record contains ample evidence of these extensive interests in Florida banks, real estate, hotels, office buildings and other businesses. For example, according to Mr. Ball the du Pont estate owns or controls 17 or more banks located in the State of Florida, the deposits of which exceed the total deposits in all banks in Florida at the bottom of the depression (Tr. 3555).

"Without attempting to summarize the vast extent of the duPont economic and financial interests in Florida, it is evident that the trustees of the estate are in a position to exert tremendous influence and wield immense power, not only in private financial and industrial circles but likewise in matters relating to state and local governmental finances. Under these circumstances it is plain that the primary interest of the du Pont estate cannot be confined to controlling the reorganized company. Moreover, even though the trustees of the du Pont estate desired to devote their major attention to operation of the reorganized company, the opportunity would nevertheless exist in the exercise of that

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control for purposes not necessarily related to the welfare of investors in the company or necessarily consistent with sound investment standards. For example, Mr. Ball commented upon his proposals to try out light modern, streamlined, air-conditioned trains between Miami and the Palm Beaches, possibly to the extent of a train each way every hour (Tr. 3536-3537)."

The Alternative Equity Plan

The alternative equity plan was responsible for the joint opposition to the Commission's Plan in the District Court and the Court of Appeals. *For the first time* the duPont Trustees, the St. Joe Paper Company, the Conn Group, the Welbon (Claughton) Group and the Lynch Interests all agreed in supporting a plan, not merely in opposing a plan.

The provision of the plan for inequality of treatment, which we have described in the brief at page 22 and which will be found in Section 6 of the plan (I, 34), would work out to the great advantage of the Conn group, the Welbon (Claughton) Group and the Lynch Interests. Taking the values which were testified to at the hearing before Judge STRUM (II, 578), the plan provided for

$20,000,000 Bonds @ 90	$18,000,000
$25,000,000 Stock @ 25	6,250,000
	$24,250,000

As there are $45,000,000 principal amount of First and Refunding Mortgage Bonds, not counting the allotment to the unsecured creditors there would be $538.89 under the plan for each $1,000 principal amount of First and Refunding Mortgage Bonds if there were a ratable distribution of the new bonds and stock. With the provision

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for inequality of treatment the Conn Group, the Welbon (Claughton) Group and the Lynch Interests could take new bonds valued at $900 instead of bonds and stock valued at $538.89, a difference of $361.11 for each $1,000 principal amount of First and Refunding Mortgage Bonds that they hold. As explained in the body of this brief (p. 22, footnote 1), it would cost St. Joe-duPont $7,295,022 (in market value) to provide the inequality of treatment.

However, while the provision for inequality of treatment was doubtless of vital importance in bringing about the agreement on joint sponsorship of the alternative equity plan, it was evidently not sufficient to be decisive itself. For there was a similar provision for inequality of treatment in the plan which the St. Joe Paper Company filed with the Commission in 1950 and agreement was not reached on that plan (282 I. C. C. 83-86).

The alternative equity plan contributed a new provision for the benefit of the Conn Group, the Welbon (Claughton) Group and the Lynch Interests which will not be found in the St. Joe Paper Company's 1950 plan. That is the provision under which they would have directorships (I, 37).

In the brief of the Lynch Interests filed October 9, 1950 after the hearings before the Commission in July and August of 1950, they indicated their willingness to accept either the plan which had been proposed by the Atlantic Coast Line or the plan which was proposed by the St. Joe Paper Company provided modifications satisfactory to the Lynch Interests were made.[1] In the case of the St. Joe Paper Company plan, which the Lynch Interests called "the Ball plan", it was contended that the minority bondholders

[1] This brief is included in the unprinted portion of the record (I, 202).

It is only fair to add that, at least in the case of the Atlantic Coast Line's plan, the proposed modifications were so drastic that the original plan would hardly have been recognizable.

should be given representation on the board of the reorganized company (p. 46-48). The St. Joe Paper Company would not accept such a modification. In their reply dated November 13, 1950, counsel for the Paper Company said[1] (p. 4, italics supplied):

> "• • • we will welcome representatives of the Lynch interests, the Conn interests, the Welbon group, or any other persons as members of the Board of Directors of the reorganized company to the extent that they are entitled to such representation by virtue of their ownership of the common stock of the company. They clearly are not entitled to 'have their cake and eat it, too.' We submit that *if any provision for representation of bondholders upon the Board of Directors be deemed necessary—and we emphatically say that none is necessary, proper or reasonable—such a provision should not arbitrarily give any named party to this case the right to select members of the Board of Directors independently of his then interest in the securities of the reorganized company.* The Lynch interests apparently have been 'in and out of the market' during the course of the proceeding and there is no reason to suppose that they will not continue so to do."

But when the alternative equity plan was negotiated the St. Joe Paper Company agreed to just the kind of a provision which they had denounced; the alternative equity plan provided that the Voting Trustees (I, 37)

> "• • • shall also elect as directors the persons designated by the hereinafter named certificate holders as follows, as long as they respectively hold certificates: viz,—The S. A. Lynch Corporation shall be entitled to designate two directors, F. K. Conn,

[1] This brief is included in the unprinted portions of the record (I, 203).

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one director; and W. G. Welbon, John W. Snyder, E. N. Claughton and A. W. Corbett, jointly, one director."

It will be noted that the only condition was that "they respectively hold certificates", i.e., voting trust certificates.

A holding of a nominal amount of voting trust certificates would meet this condition. For example, S. A. Lynch Corporation could insist on new bonds for all except $1,000 principal amount of its First and Refunding Mortgage Bonds and could take stock for the $1,000; S. A. Lynch Corporation would then be entitled to designate two directors.

When the record as a whole is reviewed, and the alternative equity plan and the St. Joe Paper Company's 1950 plan are compared, it is difficult to avoid the conclusion that the provision in the alternative equity plan for Directorships had a significant influence in bringing about the agreement on the alternative equity plan.

The Conn Group.

In November, 1951 objections to the plan were filed in the District Court by F. K. Conn, Mrs. Conn and seven others associated with Conn (I, 24).

In the pending petition for certiorari, the only petitioner is F. K. Conn. There is nothing to indicate any participation by any of those who were associated with him in November, 1951.

In January, 1949 Conn testified that the Conn Group, as then constituted (a slightly different group from that of November, 1951), held $1,108,500 of Bonds (V, 381-382). At that time Conn himself owned $387,500 and Mrs. Conn $211,000, or a total of $598,500 between them (*id.*). At the hearing before Judge STRUM, Conn did not testify; his counsel said that the group on whose behalf the objections

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had been filed in November, 1951 held $978,000 of Bonds, (II, 257) but no break-down was given. The latest data in the record about the holdings of F. K. Conn, who is the only petitioner of that Group in this Court, is that already referred to—his testimony in January, 1949, that he owned $387,500 of Bonds.

Conn testified before Judge SIBLEY in January, 1949 (V, 381-386) and at the Commission hearing in July 1950 (Tr. 6004-6011).[1] At the Commission hearing Conn proposed and supported a plan for an internal reorganization under which the capitalization of the reorganized company would consist of 405,000 shares of no par value of stock; there would be no bonds at all (282 I. C. C. 93-94, 117); and St. Joe Paper Company would control the reorganized company (282 I. C. C. 196-197).

Before Judge SIBLEY and the Commission, Conn expressed a strong preference for a so-called "debt-free" reorganization. However, since he eventually favored the alternative equity plan, under which the reorganized Florida East Coast Railway Company would have a heavy load of debt, his expressed predilection for a "debt-free" reorganization cannot be regarded as decisive.

He also evidenced a preference for "an independent reorganization" because then he and his associates "would hold a substantial portion of that equity and could speak"—would be in "a position to express our opinion in the operation of the road to the extent of our interest in that equity" (V, 385).

The alternative equity plan promised him not only a continuation of whatever fractional interest in the Florida East Coast he may now have but also a place on the Board

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[1] This and similar references are to the transcript of the hearings before the Commission, which are included in the unprinted portions of the record in this Court (I, 197).

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of Directors. The record supports the inference that the offer of a place on the Board was an important factor in leading Conn to agree to the alternative equity plan. And it is no fault of the respondent that Conn's motives in agreeing to the alternative equity plan have to be a matter of inference. For, although Conn had testified before Judge SIBLEY and before the Commission, he kept off the witness stand before Judge STRUM, as did the others who had agreed on the alternative equity plan.

The Welbon (Claughton) Group.

The leader of this Group is Edward N. Claughton, who testified before Judge SIBLEY in 1949 (IV, 297-319) and at the Commission hearing in July, 1950 (Tr. 5327-5353). Counsel for the Group always puts the name of W. G. Welbon first, but Claughton has been the leader.

Before Judge SIBLEY, the Group consisted of six men (IV, 43, 297-298). At the time of the Commission hearings in July, 1950 there were only four (282 I. C. C. 94; Tr. 5327-5328). When the time came to file objections to the present Plan in December, 1951, there were only three, E. N. Claughton, A. W. Corbett and W. G. Welbon (I, 24, 45).

The record leaves no doubt that the members in the Group, and Claughton in particular, have been heavy speculators in the First and Refunding Mortgage Bonds and that their speculations have been financed by loans made by one or more of the Florida National Group of Banks, which are controlled by St. Joe-duPont.

On December 10, 1948 Claughton testified that he owned approximately $3,500,000 of Bonds (IV, 299). When he went on the stand before Judge SIBLEY on January 11, 1949, he testified that he then owned $3,100,000 (IV, 298), of which $2,599,000 were pledged with the Florida National

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Bank at Miami (IV, 300). The Florida National Bank at Miami is controlled by the St. Joe Paper Company (267 I. C. C. 315).

Claughton further testified on January 11, 1949 about the holdings of the other five members of the Group which at that time totaled $1,400,000 (IV, 298-299). On cross-examination he said that all of the other members of the Group had had loans in the past from one or more members of the Florida National Group of Banks; that he did not know whether they all had such loans at that time; but he thought some of them did not (IV, 300-301). The Group's holdings as shown before Judge SIBLEY totaled $4,500,000, of which $3,100,000 were Claughton's and $1,400,000 were the others'.

When Claughton testified at the Commission hearing on July 11, 1950, it appeared that

> (1) the Claughton Group, which consisted of six men in January, 1949, had been reduced to four men and their aggregate holdings had been reduced to $793,000 (Tr. 5247, 5327-5328); and
>
> (2) *Claughton, who had held $3,100,000 of Bonds at the time of the hearing before Judge Sibley in the District Court on the Previous Plan* (IV, 298), *had reduced his holdings to $2,000 principal amount* (Tr. 5248, 5342).

By the time of the hearings before Judge STRUM members of the Claughton Group had apparently made some additional purchases. No testimony was given before Judge STRUM about the various holdings of the Claughton Group and other groups (there were merely statements by counsel), but counsel for the Claughton Group said that they held $1,220,000 of Bonds (II, 257). Later during the hearing before Judge STRUM counsel said (II, 357):

> "Discussions which were in progress prior to the time that the hearing began resulted in my being

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employed to represent an additional one million dollars par value of the five percent bonds held by a group of bondholders.''

Apparently the holders of the additional $1,000,000 were not Claughton, Corbett or Welbon but some other group. The record does not show who they were.

After the decision in the Court of Appeals, counsel for the Claughton Group filed a motion for a rehearing and then a motion for a stay of mandate on behalf of Claughton, Corbett and Welbon only, so that it would seem doubtful whether the additional $1,000,000 ought to be included as held by the Claughton Group. Despite this record, we have listed the Claughton Group as the holders of $2,220,000 of Bonds in the table on page 11 of this brief.

Three more things should be added:

The record establishes that Claughton and Ball, the dominant duPont Trustee and former President of the St. Joe Paper Company, have been associated in business enterprises in the past, although Ball's testimony on this subject justified the Commission's reference to him as ''vague, indefinite and adroit'' (Tr. 3587-3589; 267 I. C. C. 316-317).

The Claughton Group filed and supported a plan of reorganization at the 1950 hearings before the Commission (282 I. C. C. 94-97). It was a preposterous plan, providing for $45,000,000 of 5% income bonds.

Under the alternative equity plan the Claughton Group would have the right to name a Director (I, 37).

In view of the foregoing record it would be a mockery of Section 77 to treat the Claughton Group's opposition to the Commission's Plan as having any significance whatever.

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The Lynch Interests.

The record with respect to the identity and holdings of the bondholders who are called the Lynch Interests is somewhat confusing (II, 259, 263).

The Lynch Interests certainly include S. A. Lynch, S. A. Lynch, Jr. and S. A. Lynch Corporation and at the time of the hearing before Judge STRUM they apparently also included Ruby Russell Lynch and the Estate of Julian S. Eaton (*id.*).

The statements of the holdings were made by S. A. Lynch, Jr. during a series of colloquies between the Court and counsel, and S. A. Lynch, Jr. agreed with the Court's calculation that they had "a grand total of $2,672,000" (II, 263). Other statements made by S. A. Lynch, Jr. would indicate that the five bondholders mentioned in the previous paragraph may have held more than that.

It will be recalled that in the reply dated November 13, 1950, which we have quoted above at page vi, counsel for the St. Joe Paper Company said:

> "The Lynch Interests apparently have been 'in and out of the market' during the course of the proceeding and there is no reason to suggest that they will not continue so to do."

This statement would seem to be supported by Judge SIBLEY's finding in January 1949 that at that time (V, 472; 81 F. Supp. 930):

> "What is known as the Lynch interest represents over $3,000,000 of bonds"

As we have shown above at pages ii-iv and v-vii, the position of the Lynch Interests with respect to an internal plan prior to the agreement on the alternative equity plan presented two principal features: they vigorously attacked duPont-St. Joe control and they told the Commission that

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they should be allowed to nominate members of the Board of Directors of the reorganized company. By agreeing to the alternative equity plan they dropped their opposition to St. Joe-duPont control and they got St. Joe-duPont agreement that they could designate two Directors for a period of five years.

The record supports the inference that the promise of Directorships was decisive in securing the adherence of the Lynch Interests to the alternative equity plan. As in the case of Conn, it is not the fault of the respondent that this matter has to be left to inference; neither S. A. Lynch nor S. A. Lynch, Jr. took the stand to explain their reasons for opposing the Commission's Plan or how or why they came to agree to the alternative equity plan.

The 73 Motions to Dismiss.

One of the most curious developments in this case was the filing of 73 identical motions to dismiss the proceeding (I, 125-126, 220-228).

These motions were simply filed. There can, of course, be no doubt that one or more people spent a lot of time and effort in collecting the motions, but any inquiries on that score were blocked by having the motions merely filed and by not undertaking to have any of the signers, or anyone authorized to speak for the signers, take the witness stand.

The signers included Edward Ball and Jessie Ball duPont (I, 226) and a good many others who can be identified from the record as connected with the duPont Trust or St. Joe Paper Company in some way or other (I, 220-228). Others cannot be identified by anything in the record.

Obviously those who collected the 73 motions to dismiss must have been unfamiliar with *In re New York, New Haven & Hartford R. Co.* (C. C. A. 2, 1945) 147 F. 2d

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40, 49, and the decisions of this Court referred to by Judge SWAN, or else they must have decided to pay no attention to them. The gist of those decisions is that neither the Commission nor the Court is to be influenced by the mere massing of support for, or opposition to, a plan of reorganization, whether in Section 77 or in equity.

In pursuance of the policy of enabling the Commission and the Courts to protect the interests of security holders and of the public without being subjected to undue pressures, the Congress adopted subsection (p) of Section 77, which governs the solicitation of proxies, consents and the like; the activities of committees; and other matters. We do not assert that those who were responsible for the 73 motions to dismiss were guilty of violating subsection (p). However, the solicitation in this case of the 73 motions to dismiss seems quite contrary to the spirit of subsection (p).

The fact that it was possible to get 73 individuals or corporations to file motions to dismiss had no probative value on any issue before the Court. The motions to dismiss asserted that the Court should disapprove the Plan and should transfer the case to equity. Not a single signer of a motion explained why he desired to have the Plan disapproved and to have the case returned to equity. Not one told how much he knew about the Plan, about the risks of a transfer to equity or about other factors. Not one would submit himself to cross-examination. Indeed, none appeared by counsel and there was not even any competent evidence that any of those whose names appeared at the foot of the various motions actually owned the amounts of bonds specified therein.

The Trustees of the First and Refunding Mortgage.

As appears from the table in this brief (p. 11), Judge STRUM reached the 99% by counting as opposed to the Plan

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of the bondholders except those who were represented by e Deposit Committee. The Judge's theory must have en that the holders of the $10,584,652 of Bonds who were t represented at the hearing and had not taken any posi-n at all should be counted as opposed to the Plan because e Successor Trustees of the First and Refunding Mort-ge opposed the Plan.

There is no provision in the First and Refunding Mort-ge which authorizes the Trustees to represent the bond-lders in a Section 77 proceeding.

There is no provision in Section 77 which authorizes the ıstees of a mortgage to accept or reject a plan of reor-nization on behalf of bondholders, or otherwise to bind ndholders in any way.

It has been customary in Section 77 proceedings to per-t mortgage trustees to intervene and to be heard for or ainst a reorganization plan. The reason for permitting s has, so far as we know, never been explained by a urt; we have always assumed that mortgage trustees are owed to be heard on the merits of a plan of reorganiza-n on the theory that it is helpful to the Commission d the Court to receive evidence and hear arguments ich mortgage trustees can present. Because protective mmittees have become more or less a thing of the past, some instances (as, for example, where the bonds of an ue are widely distributed and large amounts are not d by institutions) the Commission and the Court will not r from anyone unless the mortgage trustee is permitted oe heard.

The Trustees of the First and Refunding Mortgage are e Bank of the Manhattan Company and J. Bryson Aird, o is the Vice President in charge of the Trust Depart-nt of the Bank (V, 375). Their conception of their y was stated by Aird as a witness at the hearing before dge SIBLEY as follows (V, 379):

> "Furthermore, the Trustees' positions, naturally, would be—the Trustee is ordinarily persuaded, and should be, by a large majority of its bondholders."

As appears from the table at page 11 of this brief, the holders of 69.16% of the Bonds appeared by counsel before Judge STRUM in opposition to the Plan. The Mortgage Trustees opposed the Plan too, apparently because the 69.16% opposed it. (Aird, who testified before Judge SIBLEY, did not take the stand before Judge STRUM). Since the declared policy of the Trustees was to be guided by any substantial majority in amount of the bondholders, the Mortgage Trustees' opposition to the Plan merely implemented the opposition of the holders of the 69.16%. There would be as much basis for saying that 69.16% equals 99% as for saying that the opposition of 69.16% plus the opposition of the Mortgage Trustees is equivalent to the opposition of 99%.

Appendix C

i

THE TERMS OF THE COMMISSION'S PLAN: THE COMPARISON WITH THE PREVIOUS PLAN.

The petitioners' brief undertakes (p. 12-14) to summarize the Commission's Plan and compare it with the Previous Plan.

The Terms of the Plan.

In conjunction with other Sections of the Plan, Section IX provides, subject to the qualifications noted below, that the Atlantic Coast Line shall pay over cash and issue and turn over securities for distribution to the holders of the First and Refunding Mortgage Bonds pursuant to the Plan, as of the consummation date, in exchange for all of the Debtor's assets as of that date, as follows (282 I. C. C. 216):

	Amount
Cash	$ 4,000,000
Atlantic Coast Line Railroad Company divisional first-mortgage fixed interest 3¾ percent 25-year bonds	14,000,000
Atlantic Coast Line Railroad Company general income divisional-mortgage 4¼ percent 75-year bonds	13,500,000
Atlantic Coast Line Railroad Company participating cumulative convertible $100 par-value 4 percent dividend preferred stock	9,000,000
Atlantic Coast Line Railroad Company no-par common stock (stated at $100 per share)	6,000,000
Total	$46,500,000

The effect of the related sections is as follows:

(1) The First Mortgage Bonds are to be paid in cash (Section XIV, 282 I. C. C. 222-223).

(2) All equipment obligations will be assumed (Section VIII, 282 I. C. C. 215).

(3) Portions of the Peninsular & Occidental Steamship Company tract and the Hialeah tract may be sold, if the reorganization managers shall so determine with the approval of the Court, and the proceeds distributed to the holders of the First and Refunding Mortgage Bonds (282 I. C. C. 165, 209-210, 213).

(4) A large amount of cash would be distributed from the estate to the bondholders at the time of the consummation of the Plan, if not previously distributed (282 I. C. C. 173-175, 181, 208-209, 214-215); if the Plan had been consummated as of December 31, 1951, the cash distribution to the bondholders would have been in excess of $7,000,000 (A. C. L. R. Co. Ex. No. 8, Vol. III).

(5) The provision for the cash and securities listed in the above table is subject to qualifications to the extent required by the provisions of the Plan with respect to liens for additions and betterments created by Orders of the Court (282 I. C. C. 165-168, 216-217).

(6) The distribution to the holders of the First and Refunding Mortgage Bonds would be diminished to the extent of any distribution to the holders of unsecured claims (282 I. C. C. 222-223).

With respect to the summary of the Plan in the petitioners' brief:

The petitioners fail to mention that the "ACL Preferred Stock", to which they refer, will be cumulative, participating and convertible, a security with unusual elements of value (282 I. C. C. 220-221).

They do not mention the Peninsular & Occidental Steamship Company tract and the Hialeah tract.

They do not mention the cash distribution from the estate, which is certainly a most important feature of the Plan.

The petitioners' brief says that "for each $1,000 bond

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of the Florida East Coast a holder will receive cash and Atlantic Coast Line securities at their *par* value" (p. 13, italics in original). We are at a loss to know what this statement means. In this connection, it might be mentioned that Atlantic Coast Line Common Stock is presently selling for considerably more than $100 a share and has no par value.[1]

The Comparison With the Previous Plan.

The petitioners purport to make a comparison of the Commission's Plan with the Previous Plan (p. 12-14).

Such a comparison is wholly irrelevant to the question which the Commission, the District Court and the Court of Appeals had to consider; viz. whether on the record, including the record made after the Previous Plan had been disapproved, the Commission's Plan was fair and equitable.

The petitioners say that Judge STRUM made "a few * * * adjustments" and concluded that "the bondholders will receive under the last plan far less than under the rejected third plan" (I, 153-154; 103 F. Supp. 840-841). If we understand judge STRUM's opinion he made only one "adjustment"; it was made on the hypothesis that in the Previous Plan nothing had been allowed for the prospective savings, a hypothesis which is not established by the record.

In comparing the two plans, the petitioners fail to mention the following changes reflected in the Previous Plan, all of which were favorable to the bondholders:

(1) The amount of the Atlantic Coast Line Railroad Company Divisional First Mortgage Fixed Interest 25-Year Bonds was increased by $500,000 (267 I. C. C. 750; 282 I. C. C. 216).

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[1] In *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Co.* (1936) 328 U. S. 495, 519, this Court took judicial notice of the market prices of securities traded on the New York Stock Exchange.

(2) The interest rate on the First Mortgage Bonds, the amount of which was increased to $14,000,000, was changed from 3½% to 3¾%.

(3) It was provided that the new Cumulative Participating Convertible Preferred Stock should be convertible into Atlantic Coast Line Railroad Company Common Stock at the rate of one and one-quarter shares of Common for one share of Preferred if called for redemption (282 I. C. C. 220-221).

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